Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1187

JOSEPH BAXTER, et al.,
PETITIONER,

v.

NICHOLAS A. PALMIGIANO,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JULIUS C. MICHAELSON
Attorney General
RONALD A. DWIGHT
Sp. Assistant Attorney General
250 Benefit Street
Providence, Rhode Island 02903

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

JOSEPH BAXTER, et al.,
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NICHOLAS A. PALMIGIANO,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Attorney General of Rhode Island on behalf of the Director of Rhode Island Department of Corrections and several correctional officers, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on December 20, 1974 after having been vacated and remanded by this Court, *Baxter* v. *Palmigiano*, 418 U.S. 908 (1974), for reconsideration in light of this Court's decision in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

Opinion Below

The opinion of the United States Court of Appeals handed down on December 20, 1974 is appended hereto as Appendix "A". The record and all other aspects of this case are contained in this Court's consideration of this petitioner's earlier petition for a writ of certiorari which was granted in *Baxter* v. *Palmigiano*, 418 U.S. 908 (1974).

Constitutional Provisions

United States Constitution, Articles of Amendment 5, 6, and 14.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered December 20, 1974 and appears as Appendix "A" hereto. We invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Statement of Facts

In 1969 a suit brought under 42 U.S.C. § 1983 demanded that Rhode Island afford its convicts a complex system of procedural due process as a condition precedent to disciplinary punishment or rehabilitative classification. Initially resisting change, a progressive administration decided to join the plaintiffs in what it conceived as an experiment. The defendants abated their reservations with the expectation that an unsuccessful experiment, in part or in whole, could be rescued from disaster by an approach to the District Court under Rule 60, F.R.C.P. A Code of prison disciplinary rules was adopted on March 10, 1970, therefore, by agreement. *Morris* v. *Travisono*,

310 F. Supp. 857 (D. RI, 1970). Among other things, these rules provided that convicts, charged by guards with serious rules infractions, were entitled to written notice, lay counsel, and a hearing including confrontation and cross-examination before imposition of punishment. Punishment included loss of "good time" and segregation, under closely defined conditions, for a period not to exceed 30 days. This system operated with great difficulty for three years.

A period of growing instability ensued immediately upon promulgation of the rules. This case was born on the night of November 11, 1972. Nicholas Palmigiano was serving a life sentence for murder in the Rhode Island Adult Correctional Institution. In mid-evening it appeared to Palmigiano that a fellow prisoner was seriously ill. The guards on duty, in view of all the circumstances, and after visiting the convict in question, reacted in orderly fashion. Since the maximum security unit in question imprisons less than two hundred men, help had to be summoned from the nearby Rhode Island General Hospital. A delay ensued. Ten minutes before the nightly lock-up, which did not interfere even slightly with the ensuing medical assistance, appellant allegedly advised other prisoners not to return to their cells for the 9:00 lock-up, in protest against the failure to provide medical attention. At that point guards, following the rules, charged Palmigiano with inciting a disturbance which might have resulted in a riot. *Palmigiano* v. *Baxter*, 487 F.2d 1280, 1281 (1973).

At the ensuing hearing, Palmigiano was allowed to consult with his attorney immediately before entering the hearing room, and was advised by a Deputy Warden that he had the right to remain silent during the hearing. Palmigiano was made aware that his conduct might well be viewed by the Grand Jury as a likely violation of the state's criminal laws. At the hearing Palmigiano had the

assistance of a counsel-substitute, as provided in the rules. There is no question in this case that Palmigiano remained silent except to announce that he would do just that. Palmigiano was disciplined as a result of the hearing.

Travel of the Case

Palmigiano thereafter filed an action under 42 U.S.C. § 1983 in the United States District Court for Rhode Island. The action alleged solely a deprivation of procedural due process, asserting the invalidity of the "Morris" rules for failure to provide for an appointed or retained attorney at the disciplinary hearing.

The District Judge dismissed the suit after a full hearing on the merits. This judgment was reversed on appeal, the Court of Appeals for the First Circuit holding that "appellant was denied due process in the disciplinary hearing insofar as he was not provided with use immunity for statements he might have made within the disciplinary hearing, and because he was denied access to retained counsel within the hearing." 487 F.2d 1280 (1973). The Attorney General of Rhode Island filed a petition for writ of certiorari to issue to the Circuit Court, which request was granted, 418 U.S. 908 (1974). This Court vacated the judgment in *Palmigiano* v. *Baxter, supra,* and remanded the case to the Circuit Court for reconsideration in light of its decision in *Wolff* v. *McDonnell, supra.*

In its second *Baxter* decision (*Baxter II*), Slip Opinion, Appendix A, the First Circuit held that where "an inmate is called to a disciplinary hearing under the circumstances present here, and is informed that his silence will be used against him, or indeed where his testimony is compelled, use immunity must be provided and the inmate must be so informed." *Slip Opinion, infra,* p. 2. More importantly, the Circuit Court reconsidered its holding that retained counsel be required at disciplinary hearings as follows:

> "We now alter what we said concerning the remaining issue, the right to counsel, confined to a situation where future prosecution is contemplated. *Again the Wolff ruling does not directly apply.* . . . In cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let into the disciplinary proceeding, not because *Wolff* requires it in that proceeding, but because *Miranda* requires it in light of future criminal prosecution." *Slip Opinion,* pp. 4-5 (emphasis added).

Issues Presented

1. Is a prisoner confined under sentence for conviction of a crime by a state court entitled to the presence of defense counsel at a prison disciplinary hearing where his infraction is also a crime under the V, VI and XIV Amendments to the Constitution of the United States?

2. Is a prisoner confined under sentence for conviction of a crime by a state court entitled to "use immunity" at a prison disciplinary hearing if his silence is used against him under the V and XIV Amendments to the Constitution of the United States?

Reasons for Granting the Writ

I. The First Circuit on Remand From This Court Has Failed To Follow *Wolff* v. *McDonnell* With Respect to the Requirement of Counsel at Disciplinary Hearings.

In considering the question of defense counsel at disciplinary hearings, this Court held in *Wolff* as follows:

> "The insertion of counsel into the disciplinary process would inevitably give the proceedings a more

> adversary cast and tend to reduce their utility as a means to further correctional goals. *There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held.* At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings." 418 U.S. at 570. (emphasis added).

The Court made an exception and required lay substitute counsel in highly complex cases or for illiterate inmates.

In making its ruling, this Court was well aware of the conflict of the Circuit courts on this very point. The Court sought to resolve this question as follows:

> "It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the needs of the institution.[20]" 418 U.S. at 572.

Footnote 20, significantly, states as follows:

> "[20]The Courts of Appeals, which have ruled on procedures required in prison disciplinary proceedings, have been split . . . As to counsel, two Circuits have held that there is no right, even to lay substitutes, *Braxton* v. *Carlson, supra; Sostre* v. *McGinnis, supra,* while the Third Circuit, *Meyers* v. *Alldredge, supra,* has held that there is no right to counsel where counsel-substitute is provided. The First Circuit, *Baxter* v. *Palmigiano, supra,* holds there is a right to retained counsel, even where a staff-assistant is available, while the Ninth Circuit, *Clutchette* v. *Procunier, supra,*

> envisions some sanctions at disciplinary proceedings calling for provision of counsel, and has determined that counsel must be provided where a prison rule violation may be punishable by state law. . . ." 418 U.S. at 72-73.

Despite the clarity of this holding, and even the citation of the conflicting holdings which are being resolved, the First Circuit stated on the right to counsel issue that "the *Wolff* ruling does not directly apply"! *Slip Opinion,* p. 4. The Circuit Court held in effect that *Miranda* v. *Arizona,* 384 U.S. 436 (1966), requires the presence of counsel at disciplinary hearings whenever criminal charges are a realistic possibility. Since almost all disciplinary hearings involve possession of weapons, drugs, assaults, and matters which can also be subject of criminal prosecution, the practical result is that defense counsel must be present at almost every disciplinary hearing.

II. The Question Presented in This Petition Is Of Great Importance to Many States Because of the Enormous Administrative Burden of Supplying Defense Counsel at Every Disciplinary Hearing.

Following *Baxter II,* defense counsel have been supplied at every disciplinary hearing. The hearing officer is now over 200 cases behind, whereas before *Baxter II* the backlog never exceeded thirty cases. This Court aptly pointed out that there "would be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held." 418 U.S. at 570. Unless the First Circuit's ruling is reversed by this Court, an impossible administrative burden will completely choke the disciplinary process in many prisons. Furthermore, the holding of the First Circuit makes no sense, since the

counsel who are present take no active part in the disciplinary proceeding, simply advising the inmate before and during the hearing. None of the policies of the exclusionary rule, such as prevention of illegal police behavior, is furthered by the grafting of *Miranda* to the prison disciplinary hearing.

III. The Decision Below Establishes an Unprecedented Method of Enforcement of Claimed Fifth Amendment Rights by Requiring Non-Judicial Agencies To Accord "Use Immunity" at Prison Disciplinary Hearings Which Immunity Will Later Bind the Courts of This State and of the United States in the Trial of Criminal Prosecutions.

The First Circuit's requirement that use immunity be granted to an inmate in any disciplinary hearing where his silence will be used against him is an impermissible extension of Fifth Amendment rights. The opinion flows from the teaching of *Simmons* v. *United States*, 390 U.S. 377 (1968), which excluded testimony given in a previous suppression hearing. The First Circuit's ruling is contrary to the later teaching of *McGautha* v. *California*, 402 U.S. 183 (1971), where this Court refused to extend *Simmons* because no deterrence of unlawful police behavior would result. Likewise, here, no weakening of the efficacy of the exclusionary rule would follow from a failure to grant use immunity. No policy behind the exclusionary rule will be advanced. The First Circuit has applied the letter of *Simmons*, *supra*, while ignoring its rationale. "Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha*, *supra*, at 212.

Conclusion

For all the above reasons, your petitioner prays that this Honorable Court grant this Writ of Certiorari directed to the United States Court of Appeals for the First Circuit and that this Honorable Court establish a briefing schedule towards the ultimate determination of this case.

Respectfully submitted,

Julius C. Michaelson
Attorney General
Ronald A. Dwight
Sp. Assistant Attorney General
250 Benefit Street
Providence, Rhode Island 02903
(401) 831-6850

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 73-1088

NICHOLAS A. PALMIGIANO,
APPELLANT,
v.
JOSEPH BAXTER, et al.,
APPELLEES.

ON RECONSIDERATION AFTER REMAND

Before COFFIN, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Stephen J. Fortunato, Jr., with whom *McKinnon and Fortunato* and *Ellen Katz* were on brief, for appellant.

Cary J. Coen, *John M. Roney*, *Max Stern*, *Stern & Shapiro*, and *Stanley A. Bass* on brief for Robert Flint and Michael Roberts, Amici Curiae.

W. Slater Allen, Jr., Assisant Attorney General, with whom *Richard J. Israel*, Attorney General was on brief, for appellee.

December 20, 1974

Per Curiam. The Supreme Court vacated the judgments of this court in *Palmigiano* v. *Baxter*, 487 F.2d 1280 (1973), *vacated and remanded*, *Baxter* v. *Palmigiano*, . . . U.S. . . . , 94 S.Ct. 3200 (1974), for reconsideration in light of its decision in *Wolff* v. *McDonnell*, 418 U.S. . . . , 42 U.S.L.W. 5190 (June 26, 1974). We have received memoranda of law from the parties and have reconsidered our prior decision.

We begin by recognizing that the prisoner in this case had been given a number of state-guaranteed procedural rights under the rules promulgated by the Rhode Island

authorities pursuant to *Morris* v. *Travisono*, 310 F.Supp. 857 (D. R.I. 1970). *See Palmigiano, supra*, 487 F.2d at 1285 n. 13 (1973). What was at issue before this court were three additional rights which were claimed on constitutional grounds: the right to remain silent under circumstances where the subject matter of the disciplinary hearing was also a possible basis for criminal prosecution; the right to require the prison disciplinary board to call adverse witnesses; and the right to have retained counsel at the disciplinary hearing. Of these, we rejected the claim that the board should be required to call adverse witnesses and this holding is supported by the Court's judgment in *Wolff* that, so long as the fact finders state the evidence relied on and reasons for disciplinary action, prison officials must have discretion "to refuse to call witnesses that may create risk of reprisal or undermine authority." 42 U.S.L.W. at 5198-99. On the other issues before us, we found constitutionally protected rights and we now reconsider those holdings.

The Court in *Wolff* did not address the issue of the right to remain silent under the circumstances here. *Clutchette* v. *Procunier*, Docket No. 71-2357 (9th Cir. Oct. 21, 1974), opinion on rehearing. In this case, unlike the Ninth Circuit's case in *Clutchette*, the inmate was specifically advised that the facts giving rise to the disciplinary hearing could also lead to state prosecution, that he should consult his lawyer, and that his silence in the disciplinary hearing would be held against him. A finding of disciplinary infraction could lead to segregation. Having reexamined our original opinion, we reaffirm our ruling as to this particular inmate. Where an inmate is called to a disciplinary hearing under the circumstances present here, and is informed that his silence will be used against him, or indeed where his testimony is compelled, use immunity must be provided and the inmate must also be so informed. Our prior directive to expunge appellant's in-prison record of findings and

decisions relating to the alleged infraction and disciplinary board hearing stands.

We are impelled, however, to reconsider our prior position which we thought struck the appropriate balance between needs of the prison authorities to get to the bottom of any prison problems and protection of the inmate who may face state prosecution for the same offense. We held that the authorities could compel a prisoner to testify*, while giving — we thought — full protection to the prisoner in the form of use immunity in any future prosecution, a step which would impose "no burden upon the prison disciplinary hearing". *Palmigiano, supra,* 487 F.2d at 1289.

We now think that we were in error on two counts. In the first place, we too easily applied the right of an inmate to remain silent without his silence being used against him — the issue in this case — to the situation in which no adverse inference is drawn from silence but in which the inmate must choose whether or not to testify to potentially self-incriminating matters in order to rebut or explain facts presented against him at the disciplinary hearing. *Clutchette* v. *Procunier,* 497 F.2d 809, 823, 824 n. 23 (9th Cir. 1974), *vacated and remanded,* . . . . U.S. . . . . , and recently, on this issue, reaffirmed, ... F.2d . . . . (No. 71-2357, Oct. 21, 1974). Concededly, the prospect of future criminal prosecution places a prisoner before a disciplinary board in an awkward spot that could make the choice between speaking and remaining silent difficult. But, as we have subsequently held in *Flint* v. *Mullen,* 499 F.2d 100 (1st Cir. 1974), not every adverse consequence which flows from remaining silent can be characterized as an unconstitutional penalty upon the exercise of the privilege against self-incrimination.

---

* The treatment of Palmigiano was consistent with the rules established in *Morris, supra.* The hearing rules provides that the "inmate shall admit or deny the charges" and "the Board members may interrogate the inmate . . . . as necessary." 310 F.Supp. at 873.

In the second place, we now realize that allowing prison officials to coerce testimony where they wish by extending immunity has awesome implications. It cheapens the Fifth Amendment. Immunity could be given where it would be scant recompense for the consequences of coerced testimony. There is also the institutional problem. Since prison officials themselves lack the authority to grant immunity, formal judicial proceedings and a full stenographic transcript would be required. Our prior opinion did not take such considerations into account.

While reaffirming our holding as to appellant, we amend our prior opinion by withdrawing our declaration as to a general right on the part of the prison authorities to compel testimony and a general right on the part of inmates to use immunity when they come before a disciplinary board.

We reiterate that the Fifth Amendment privilege against self-incrimination extends to an incarcerated suspect, whether or not interrogation is intended to obtain evidence for further prosecution, *Mathis* v. *United States,* 391 U.S. 1 (1968). An inmate subjected to such interrogation is entitled to be advised of his right to remain silent, and cannot be further interrogated should he choose not to speak. His silence may not be used against him at that time or in future proceedings. *Lefkowitz* v. *Turley,* 414 U.S. 70, 77 (1973); *see Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Spevack* v. *Klein,* 385 U.S. 511 (1967).

We now alter what we said concerning the remaining issue, the right to counsel, confined to a situation where future prosecution is contemplated. Again the *Wolff* ruling does not directly apply. This particular problem is more akin to that presented in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), where the Court was concerned with "circumstances surrounding in-custody interrogation [which] can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators." 384 U.S. at 469-70.

Mathis, supra, applied *Miranda's* reasoning to those already in prison. It follows, therefore, that the *Miranda* solution must be foremost in the minds of prison administrators. They must make it quite clear to an inmate who is under threat of criminal prosecution that while he has a due process right to speak, he is under no compulsion to do so. If the inmate chooses to remain silent, he must not be questioned further. Moreover, in cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let into the disciplinary proceeding, not because *Wolff* requires it in that proceeding, but because *Miranda* requires it in light of future criminal prosecution.

As to the necessity for providing counsel or permitting retained counsel in disciplinary proceedings where no further criminal process is anticipated, *Wolff* indicates that the only requirement is for counsel substitute where the inmate is illiterate or incapable of adequately presenting his case. 42 U.S.L.W. at 5200. The *Morris* rules provide for such counsel substitute in all disciplinary cases where the inmate has requested it. We amend our prior opinion to the extent that we found a denial of due process in refusing access to retained counsel within the disciplinary hearing, 487 F.2d at 1292. We now affirm the district court's ruling on this point.

The judgment is affirmed in part and reversed in part; the matter is remanded to the District Court for further proceedings consistent with our amended opinion.

Supreme Court, U. S.
FILED
JUL 23 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1187

JOSEPH BAXTER, et al.,
Petitioners,

v.

NICHOLAS A. PALMIGIANO,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED 3/19/75
CERTIORARI GRANTED 6/9/75

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. #5053

NICHOLAS A. PALMIGIANO,
PLAINTIFF,
v.

JOSEPH BAXTER,
Captain, Adult Correctional Institutions,
State of Rhode Island;
NORMAN CARNEY,
Officer, Adult Correctional Institutions;
MITCHELL SINER,
Officer, Adult Correctional Institutions;
FRANCIS HOWARD,
Warden, Adult Correctional Institutions;
ROLAND P. REMILLARD,
Deputy Warden, Adult Correctional Institutions.

DOCKET ENTRIES

1972		
Nov.	15	Complaint filed together with Appearance of Stephen J. Fortunato, Jr., Esq. for Pltff.
		Summons issued returnable within 20 days after service.
		Pltff's Motion for Temporary Restraining Order filed.
	16	Order to Show Cause re granting of Preliminary Injunction entered and Hearing Nov. 21, 1972
		Petition for Writ of Habeas Corpus ad Test. filed.
		Order re Writ of Habeas Corpus ad Test re Nicholas Palmigiano entered and Writ issued.
	17	Summons returned duly served and filed.
		Writ returned duly served and filed.
	21	Deft's Answer filed with appearance of W. Slater Allen Jr.

1972

Appearance of Ellen Katz, Esq. for Pltff filed.
Appearance of Edward F. Burke, Esq. for Defts. filed.
Case proceeds to hearing.
Stephen J. Fortunato, Jr., Esq. and Ellen Katz, Esq. for Pltff.
W. Slater Allen, Asst. Atty. Gen'l and Edward F. Burke, Esq. for Defts.
2 Pltff's Witnesses sworn. 1 Pltff's Exhibit introduced.
2 Defts' Exhibits introduced.

22 Hearing continues. 3 Pltff's Witnesses sworn.
Mr. Allen plays tape on the recording machine to Court — Ex. B.
Pltff. Rests. Mr. Fortunato requests permission to amend pleadings, etc. Motion granted.
Mr. Burke makes statement re "Morriss Rules".
Defts' Rest.
Mr. Allen argues to Court. Mr. Fortunato argues to Court.
Memos to be filed by November 27, 1972.
Court reserves decision.

27 3 Pltff witness subpoenas and 1 Pltff document subpoena returned duly served and filed.
Pltff's Amended Complaint filed.
Affidavit of Nicholas Palmigiano filed.

Dec. 15 Opinion filed.

1973

Jan. 4 Pltff's Motion for Reconsideration filed.

5 Withdrawal of Cary Coen, Esq. as Atty. for Pltff. approved and filed.

15 Appearance of E. W. Katz, Esq. for Pltff. filed.
Case called for hearing. E. W. Katz, Esq., for Pltff. argues Motion for Reconsideration. W. S. Allen, Esq. for Deft. argues in reply. Mrs. Katz —in reply. Court reserves decision.

1973

19 Opinion filed re motion for re-consideration.

26 Opinion filed re Motion for Reconsideration entered and filed.

Feb. 16 Pltff's Motion for Leave to appeal in forma pauperis and Order granting said Motion entered and filed.
Pltff's Notice of Appeal filed (copy to W. Slater Allen Esq., Counsel for Defts.)

21 Authorization for transcript in forma pauperis approved and filed.

Mar. 16 Reporter's Transcript re: Hearing re Pltff's Motion for Temporary Restraining Order filed.

19 Voucher for transcript approved and filed (copy to Admin. Office).

20 Record on Appeal together with certified copy of docket entries mailed to Clerk, Court of Appeals, Boston, Mass.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 73-1088

GENERAL DOCKET

1973

Mar. 21 Record on appeal in two volumes filed and case docketed.

23 Appearance of W. Slater Allen, Jr. for appellees filed.

Apr. 2 Appearances of Ellen Wilbur Katz and Stephen J. Fortunato, Jr., for the appellant filed.

4 Appellant's Designation and Statement of Issues filed.

1973

20 Motion filed. Order (Coffin, Ch.J.) enlarging time for filing brief for appellant to May 25, 1973. Notices mailed.

May 25 Appendix to briefs and brief for appellant filed.

June 18 Motion filed. Order (McEntee, J.) enlarging time for filing brief for appellees to June 29, 1973. Notices mailed.

July 9 Motion filed. Order (Coffin, Ch.J.) enlarging time for filing brief for appellees to July 20, 1973. Notices mailed.

July 20 Brief for appellee filed.

26 Motion filed. Order (Coffin, Ch.J.) granting leave to amicus curiae to file 4 copies of brief etc. Notices mailed.

Aug. 7 Stipulation *re* amicus brief filed. Brief amicus curiae for Robert Flint and Michael Roberts filed.

29 Assigned for hearing at the September, 1973, session.

Sept. 5 Heard before Coffin, McEntee and Kilkenny.

Nov. 16 Judgment: The judgment of the District Court is vacated and the cause is remanded to that Court for further proceedings consistent with the opinion of the Court filed this day. Appellant to recover 3/4 of his costs; no other costs. Opinion of the Court by Coffin, Chief Judge. Dissenting opinion by Kilkenny, J. Notice mailed.

Dec. 3 Motion filed. Order (Coffin, Ch.J.) enlarging time for filing itemized and verified bill of costs to December 4, 1973. Notices mailed.

10 Mandate issued; copy filed. Taxation of costs filed.

26 Notice of appeal filed.

1974

Jan. 4 "Motion for Stay" and memorandum in support thereof filed.

15 Motion filed. Order (Coffin, Ch.J.) granting leave to appelalnt to file response and opposition to motion for stay today. Notices mailed. Appellant's response and objection to motion for stay filed.

16 Order (Coffin, Ch.J.) denying motion for stay. Notices mailed.

Aug. 9 Certified copy of Supreme Court granting certiorari (7/8/74) [No. 73-1247] filed. Certified copy of order of Supreme Court vacating judgment of this court and remanding for further proceedings (7/8/74) filed. [No. 73-1247]. Order (Campbell, J.) directing counsel to file memoranda on or before Sept. 6, 1974. Notices mailed.

Sept. 6 Memorandum of Law of Nicholas A. Palmigiano filed.

11 Motion filed. Stipulation filed. Order (Coffin, Ch.J.) granting leave to Michael Roberts et al. to file a memorandum amici curiae. Notices to counsel. Memorandum of amici filed.

20 Memorandum on remand filed by appellees.

30 Submitted to Coffin, Ch.J., McEntee and Campbell, JJ.

Dec. 20 Judgment: The judgment of the District Court is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings consistent with the opinion of this Court of November 16, 1973, as amended by the opinion of the Court filed this day. Appellant to recover 1/2 of his costs; no other costs. Opinion per curiam. Notices mailed.

1975

Jan. 16 Mandate issued and copy filed. Notices mailed.

Mar. 26 Notice of filing petition for certiorari (74-1187) filed 3/19/75.

June 17 Certified copy of order from Supreme Court granting certiorari (6/9/75) [74-1187] filed.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title omitted in printing]

COMPLAINT

JURISDICTION

1. Jurisdiction in this matter arises under Title 28 USC 1343 and Title USC 1983, and also under the Constitution of the United States, in particular but not limited to, the First, Fifth, and Fourteenth Amendments thereto.

PARTIES

2. Plaintiff Nicholas A. Palmigiano is a resident of the Adult Correctional Institutions, Howard, Rhode Island, confined therein under sentence of a Court of Law.

3. Plaintiff Palmigiano is the same Nicholas A. Palmigiano who is the President of the National Prison Reform Association and who has brought other suits in Federal Court to redress the grievances of himself and other inmates, and the defendants are well aware of plaintiff Palmigiano's activities in the area of prison reform.

4. Defendants Baxter, Carney and Siner are officers and guards at the Adult Correctional Institutions, Howard, Rhode Island and on November 13, 1972 convened together as a hearing board, so called, to review charges brought against plaintiff Palmigiano for violations of prison regulations.

5. Defendant Howard is the warden of the Adult Correctional Institutions and as such is charged with the day-to-day supervision and administration of the Adult Correctional Institutions; defendant Remillard is the deputy warden of the Adult Correctional Institutions and as such assists defendant Howard in discharging his duties.

6. Defendants are sued individually and in their official capacities, and at all times complained of herein, the defendants were acting under color of law by virtue of their positions as state officials.

FACTS OF THE CASE

7. On or about November 11, 1972 at approximately 8:55 p.m., plaintiff Palmigiano attempted to secure medical assistance for another prisoner whom he believed to be seriously ill and who in fact was gasping for breath, vomiting, and convulsing; and plaintiff Palmigiano sought medical assistance by calling the attention of at least two prison officials to the plight of the sick man.

8. On or about November 11, 1972 and shortly after he had attempted to secure aid and assistance for the sick man, plaintiff Palmigiano was charged with a violation of prison discipline, specifically, "Inciting a disturbance and disruption of A.C.I. operations which might have resulted in a riot . . ."; plaintiff Palmigiano was further charged with being a threat to the security of the Institution and was advised that he should contact his attorney because criminal charges might be brought against him.

9. On November 13, 1972, defendants Baxter, Carney, and Siner, sitting as a disciplinary hearing board summoned plaintiff Palmigiano before them to answer the charges set forward in the preceding paragraph; defendant Remillard was present in the room in which the hearing board convened and in fact conferred with and advised and acted in concert with the hearing board.

10. Plaintiff Palmigiano appeared before defendants Baxter, Carney, Siner and Remillard accompanied by his attorney, Stephen J. Fortunato, Jr.; plaintiff Palmigiano was informed that he could not have an attorney present, at which point plaintiff Palmigiano and his attorney removed themselves from the room for a short period of time with the leave of the board.

11. While outside the hearing room and while conferring with his attorney, plaintiff Palmigiano was approached by defendant Remillard who introduced himself to plaintiff's attorney and said to the attorney that he could advise his client to remain mute but that plaintiff Palmigiano's silence would be considered adversely when the board considered its decision.

12. In fact, plaintiff Palmigiano's attorney did not attend the hearing and plaintiff Palmigiano informed defendants Baxter, Carney, Siner and Remillard that he chose to remain mute.

13. The defendants did not hear or consider any evidence whatsoever either for or against the plaintiff, and in fact, defendants Baxter, Carney and Siner found plaintiff Palmigiano guilty of the charges brought against him without receiving any evidence whatsoever; and upon their finding of guilty, defendants Baxter, Carney and Siner sentenced plaintiff Palmigiano to thirty days in the Behavioral Correctional Unit, also known as the B.C.U., segregation and the hole, and recommended that he be down-graded in classification at the end of the thirty days so that he would remain in the B.C.U. indefinitely; and defendants Baxter, Carney and Siner also recommended that plaintiff Palmigiano lose any and all good time that he had accumulated.

14. Defendant Remillard advised and acted in concert with defendants Baxter, Carney and Siner in rendering their decision and sentence, which was unwritten; defendant Howard ratified the board's decision without giving reasons; and the arbitrary actions of all the defendants were taken to punish plaintiff for exercising his right to seek redress in courts of law and speak publicly on prison reform.

15. The defendants declared that the hearing, so called, could not be delayed for any longer than one week.

16. The actions of the defendants in denying plaintiff Palmigiano the assistance of counsel at a disciplinary hearing were in derogation of plaintiff's Fifth, Sixth and Fourteenth Amendment rights to be assisted by counsel when threatened with punishment in the form of loss of liberty and privileges by state officials.

17. The actions of the defendants in denying plaintiff Palmigiano the assistance of counsel at the disciplinary hearing were in derogation of plaintiff's Fifth, Sixth and Fourteenth Amendment rights to counsel in that plaintiff was in a custodial situation, had been informed that criminal charges could and might be placed against him and if, in fact, he made any statements those statements could be used against him in a future criminal prosecution.

18. The actions of the defendants in conducting a disciplinary hearing at which they threatened to use and used plaintiff's silence as evidence of guilt and which hearing was conducted without giving plaintiff any assurance that no criminal charge would follow or that his statements would not be used against him at a future criminal trial, were in derogation of plaintiff's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

19. The actions of the defendants in finding the plaintiff guilty without considering any evidence whatsoever was in derogation of plaintiff's right not to be deprived of his liberty without due process of law as guaranteed by the Fourteenth Amendment, and Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff Palmigiano prays that this Court:

1. Declare the actions of the defendants in refusing him the assistance of counsel, to be unconstitutional and in derogation of his Fifth, Sixth and Fourteenth Amendment rights;

2. Declare the decision and sentence rendered by the defendants to be null and void on the grounds that plaintiff's right to due process of law was violated in that no evidence whatsoever was produced against him;

3. Declare the procedure followed by the board, namely, the drawing of adverse inferences, from the refusal of the plaintiff to make any statements, to be in derogation of the Fifth and Fourteenth Amendments to the United States Constitution;

4. Declare the convening of any disciplinary hearing based upon facts from which a criminal prosecution could be brought against plaintiff to be unconstitutional and in derogation of plaintiff's Fifth and Fourteenth Amendment rights, unless and until any criminal charge is disposed of or, in the alternative, the plaintiff is guaranteed by appropriate officials that no criminal charges will be placed against him arising out of any alleged incidents that also constitute an alleged violation of prison regulations;

5. Enjoin the defendants, each and every one of them, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them, from convening a disciplinary hearing and from punishing and threatening to punish plaintiff by confinement to the B.C.U., downgrading in classification or any other manner until plaintiff is assured that no criminal charge will be brought against him arising out of the same incident by the issuance of a temporary restraining order, to be made into preliminary and permanent injunctions after appropriate proceedings;

6. Enjoin the defendants, each and every one of them, their agents, servants, employees, officers and attorneys

and all persons acting in concert with them, by the issuance of a temporary restraining order, to be made into preliminary and permanent injunctions after appropriate proceedings, from prohibiting the plaintiff from having the assistance of counsel at any and all disciplinary hearings arising out of the incidents of November 11, 1972 and from punishing or threatening to punish the plaintiff without any evidence of guilt of a prison regulation violation whatsoever, and for exercising his constitutional right to remain silent in the face of charges brought against him;

7. Grant any other relief that this Court deems just and equitable.

NICHOLAS A. PALMIGIANO
By his attorney,
(s) STEPHEN J. FORTUNATO, JR.
STEPHEN J. FORTUNATO, JR.

VERIFICATION

First being duly sworn, I, Nicholas A. Palmigiano, do declare and swear that I have read the foregoing Complaint and the facts alleged therein are true and correct.

(s) NICHOLAS A. PALMIGIANO
NICHOLAS A. PALMIGIANO

Subscribed and sworn to before me at Cranston, Rhode Island this 14th day of November, 1972.

(s) (ILLEGIBLE), *Notary Public*

[Title Omitted in Printing]

MOTION FOR A TEMPORARY RESTRAINING ORDER

Now comes the plaintiff in the above matter and moves this court on the basis of the facts set forth in his verified complaint which has been duly filed with the Clerk of this Court and also the affidavit affixed hereto as appendix "A"

to issue a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure restraining and enjoining the defendants, each and every one of them, their employees, agents, servants, officers, attorneys, and all persons acting in concert with them from: punishing, threatening to punish, or harassing the plaintiff in any way for an alleged violation of prison regulations on November 11, 1972 and for allegedly being a threat to the security of the Adult Correctional Institutions on the grounds that:

1. Plaintiff, Nicholas A. Palmigiano, is being punished with a loss of liberty for thirty (30) days and a threatened loss of liberty for an indefinite period, as a result of a finding of guilty and a sentence thereon resulting from a hearing which received absolutely no evidence against him and which, in fact, considered his remaining silent as evidence of his guilt, in derogation of plaintiff's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments and his right to due process of law as secured by the Fourteenth Amendment;

2. Plaintiff, Nicholas A. Palmigiano, was deprived of his liberty and continues to be deprived of his liberty as a result of defendants' conducting a hearing at which plaintiff, Nicholas A. Palmigiano, was not allowed the assistance of his counsel, even though the loss of his liberty was threatened and even though a criminal prosecution could arise out of the very incident that was the subject of the disciplinary hearing conducted and sanctioned by the defendants, all in derogation of plaintiff's right to the assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The plaintiff further represents that he is being irreparably injured as a direct result of the actions of the defendants, in that his liberty of movement is restricted substantially and considerably when compared to the liberty he enjoyed prior to the hearing of November 13, 1972 and

while he was still a member of the general prison population, and that he also loses numerous other privileges, including visitation rights; the plaintiff further declares that time is of the essence and that should this Court grant the within motion for a temporary restraining order, the plaintiff will be spared from irreparable harm and the rights of the defendants will not in any way be prejudiced.

NICHOLAS A. PALMIGIANO
By his attorney,
(s) STEPHEN J. FORTUNATO, JR.
STEPHEN J. FORTUNATO, JR.
10 Jefferson Boulevard
Warwick, Rhode Island 02888

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

APPENDIX "A"

AFFIDAVIT

First being duly sworn, I, Stephen J. Fortunato, Jr., do declare and swear that I am a member of the Bar of the Supreme Court of Rhode Island and of the United States District Court for the District of Rhode Island; that on November 13, 1972, I attempted to represent Nicholas A. Palmigiano, my client, at a disciplinary hearing being held at the Adult Correctional Institutions, Howard, Rhode Island; that I was informed by the defendants that counsel would not be permitted to remain during the hearing; that when I removed myself from the hearing room, along with my client, I was approached by the defendant, Roland P. Remillard, who informed me that I could inform my client to remain mute, but that his silence would be considered adversely in any decision made by the Hearing Board, and that his silence would be detrimental to his defense.

(s) STEPHEN J. FORTUNATO, JR.
STEPHEN J. FORTUNATO, JR.

[Jurat Omitted in Printing]

[Title Omitting in Printing]

PLAINTIFF'S AMENDED COMPLAINT

Jurisdiction

1. Jurisdiction in this matter arises under Title 28 USC 1343 and Title USC 1983, and also under the Constitution of the United States, in particular but not limited to, the First, Fifth, and Fourteenth Amendments thereto.

Parties

2. Plaintiff Nicholas A. Palmigiano is a resident of the Adult Correctional Institutions, Howard, Rhode Island, confined therein under sentence of a Court of Law.

3. Plaintiff Palmigiano is the same Nicholas A. Palmigiano who is the President of the National Prison Reform Association and who has brought other suits in Federal Court to redress the grievances of himself and other inmates, and the defendants are well aware of plaintiff Palmigiano's activities in the area of prison reform.

4. Defendants Baxter, Carney and Siner are officers and guards at the Adult Correctional Institutions, Howard, Rhode Island, and on November 13, 1972 convened together as a hearing board, so called, to review charges brought against plaintiff Palmigiano for violations of prison regulations.

5. Defendant Howard is the warden of the Adult Correctional Institutions and as such is charged with the day-to-day supervision and administration of the Adult Correctional Institutions; defendant Remillard is the deputy warden of the Adult Correctional Institutions and as such assists defendant Howard in discharging his duties.

6. Defendants are sued individually and in their official capacities, and at all times complained of herein, the defendants were acting under color of law by virtue of their positions as state officials.

Facts of the Case

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8. On or about November 11, 1972 and shortly after he had attempted to secure aid and assistance for the sick man, plaintiff Palmigiano was charged with a violation of prison discipline, specifically, "Inciting a disturbance and disruption of A.C.I. operations which might have resulted in a riot . . ."; plaintiff Palmigiano was further charged with being a threat to the security of the Institution and was advised that he should contact his attorney because criminal charges might be brought against him.

9. On November 13, 1972, defendants Baxter, Carney, and Siner, sitting as a disciplinary hearing board summoned plaintiff Palmigiano before them to answer the charges set forward in the preceding paragraph; defendant Remillard was present in the room in which the hearing board convened and in fact conferred with and advised and acted in concert with the hearing board.

10. Plaintiff Palmigiano appeared before defendants Baxter, Carney, Siner and Remillard accompanied by his attorney, Stephen J. Fortunato, Jr.; plaintiff Palmigiano was informed that he could not have an attorney present, at which point plaintiff Palmigiano and his attorney removed themselves from the room for a short period of time with the leave of the board.

11. While outside the hearing room and while conferring with his attorney, plaintiff Palmigiano was approached by defendant Remillard who introduced himself to plaintiff's attorney and said to the attorney that he could advise his

client to remain mute but that plaintiff Palmigiano's silence would be considered adversely when the board considered its decision.

12. In fact, plaintiff Palmigiano's attorney did not attend the hearing and plaintiff Palmigiano informed defendants Baxter, Carney, Siner and Remillard that he chose to remain mute.

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14. Defendant Remillard advised and acted in concert with defendants Baxter, Carney and Siner in rendering their decision and sentence, which was unwritten; defendant Howard ratified the board's decision without giving reasons; and the arbitrary actions of all the defendants were taken to punish plaintiff for exercising his right to seek redress in courts of law and speak publicly on prison reform.

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16. The actions of the defendants in denying plaintiff Palmigiano the assistance of counsel at a disciplinary hearing were in derogation of plaintiff's Fifth, Sixth and Fourteenth Amendments rights to be assisted by counsel when threatened with punishment in the form of loss of liberty and privileges by state officials.

17. The actions of the defendants in denying plaintiff Palmigiano the assistance of counsel at the disciplinary hearing were in derogation of plaintiff's Fifth, Sixth and Fourteenth Amendment rights to counsel in that plaintiff was in a custodial situation, had been informed that criminal charges could and might be placed against him and if, in fact, he made any statements those statements could be used against him in a future criminal prosecution.

18. The actions of the defendants in conducting a disciplinary hearing at which they threatened to use and used plaintiff's silence as evidence of guilt and which hearing was conducted without giving plaintiff any assurance that no criminal charge would follow or that his statements would not be used against him at a future criminal trial, were in derogation of plaintiff's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

19. The actions of the defendants in finding the plaintiff guilty without considering any evidence whatsoever was in derogation of plaintiff's right not to be deprived of his liberty without due process of law as guaranteed by the Fourteenth Amendment, and plaintiff has no adequate remedy at law.

20. The actions of the defendants as set forth above cause plaintiff irreparable injury in that they violate his fundamental rights, confine him to a cell for twenty-three hours a day, deprive him of all visiting privileges except with attorneys, cause him to lose the dollar per day he was earning as a prison barber, cause him to lose thirty days good time credit and put a black mark on his prison record that can and will be considered by the parole board and the classification board when plaintiff is eligible for parole or for admission to special rehabilitative programs or transfer to the minimum security section of the Adult Correctional Institutions.

WHEREFORE, plaintiff Palmigiano prays that this Court:

1. Declare the actions of the defendants in refusing him the assistance of counsel, to be unconstitutional and in derogation of his Fifth, Sixth and Fourteenth Amendment rights;

2. Declare the decision and sentence rendered by the defendants to be null and void on the grounds that plaintiff's right to due process of law was violated in that no evidence whatsoever was produced against him;

3. Declare the procedure followed by the board, namely the drawing of adverse inferences, from the refusal of the plaintiff to make any statements, to be in derogation of the Fifth and Fourteenth Amendments to the United States Constitution;

4. Declare the convening of any disciplinary hearing based upon facts from which a criminal prosecution could be brought against plaintiff to be unconstitutional and in derogation of plaintiff's Fifth and Fourteenth Amendment rights, unless and until any criminal charge is disposed of or, in the alternative, the plaintiff is guaranteed by appropriate officials that no criminal charges will be placed against him arising out of any alleged incidents that also constitute an alleged violation of prison regulations;

5. Enjoin the defendants, each and every one of them, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them, from convening a disciplinary hearing and from punishing and threatening to punish plaintiff by confinement to the B.C.U., downgrading in classification or any other manner until plaintiff is assured that no criminal charge will be brought against him arising out of the same incident by the issuance of a temporary restraining order, to be made into preliminary and permanent injunctions after appropriate proceedings;

6. Enjoin the defendants, each and every one of them, their agents, servants, employees, officers and attorneys

and all persons acting in concert with them, by the issuance of a temporary restraining order, to be made into preliminary and permanent injunctions after appropriate proceedings, from prohibiting the plaintiff from having the assistance of counsel at any and all disciplinary hearings arising out of the incidents of November 11, 1972, and from punishing or threatening to punish the plaintiff without any evidence of guilt of a prison regulation violation whatsoever, and for exercising his constitutional right to remain silent in the face of charges brought against him;

7. Order the defendants to expunge from plaintiff's prison record all findings, decisions and descriptions of any kind pertaining to the events and happenings complained of herein;

8. Award plaintiff compensatory damages of ONE HUNDRED DOLLARS ($100.00) per day for every day he has spent in punitive segregation;

9. Award plaintiff the costs of this litigation, plus reasonable attorney's fees;

10. Grant any other relief that this Court deem just and equitable.

NICHOLAS A. PALMIGIANO
By his attorney,
(s) STEPHEN J. FORTUNATO, JR.
STEPHEN J. FORTUNATO, JR.

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

ANSWER

FIRST DEFENSE

The Plaintiff has failed to utilize the administrative remedies provided by the state.

SECOND DEFENSE

Plaintiff knowingly and by advice of counsel waived his right to a hearing. Plaintiff had no right to legal representation before the board.

THIRD DEFENSE

The complaint fails to state a claim under 42 U.S.C., §1983 and 28 U.S.C. §1343 upon which relief may be granted. Less than $10,000 is involved.

FOURTH DEFENSE

1. The defendants admit the allegations of paragraph 2, 4, 5, 8, 9, 10, 11 and 12 of the complaint.

(2) The defendants deny the allegations of paragraph 1, 6, 13, 14, 16, 17, 18 and 19 of the complaint.

(3) The defendants neither admit nor deny the allegations contained in paragraphs 7 and 15 of the complaint.

JOSEPH BAXTER, et als.
By their Solicitors,
RICHARD J. ISRAEL
Attorney General
W. SLATER ALLEN, JR.
(8) W. SLATER ALLEN, JR.
Assistant Attorney General

STENOGRAPHIC TRANSCRIPT OF HEARING

[1] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 5053
NICHOLAS A. PALMIGIANO
v.
JOSEPH BAXTER, et al.

Before his Honor, Judge Edward W. Day
Tuesday, November 21, 1972
Wednesday, November 22, 1972

APPEARANCES:

For the Plaintiff:
Stephen J. Fortunato, Jr., Esq.
Ellen Wilbur Katz, Esq.

For the Defendants:
W. Slater Allen, Esq.
Assistant Attorney General
State of Rhode Island
Edward F. Burke, Esq.
Department of Corrections

HEARING re PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

FIRST DAY
TUESDAY, NOVEMBER 21, 1972
10:10 A.M.

[2] The Clerk: Nicholas A. Palmigiano v. Joseph Baxter, et al.

Mr. Allen: Ready.

Mr. Fortunato: Ready.

The Court: You may proceed.

Mr. Fortunato: Good morning, your Honor.

May it please the Court, this matter is before this Court on a matter of preliminary relief sought by Nicholas Palmigiano, a man now detained at the Correctional Institutions at Howard, Rhode Island.

The first witness the plaintiff will call is Luther Gorton.

LUTHER C. GORTON, Sworn

Direct Examination by Mr. Fortunato

Q. Mr. Gorton, where are you employed? A. State Prison.

Q. What is your function at the State Prison? A. Correctional officer.

Q. How long have you been employed there? A. 13 years.

Q. Please describe for the Court your general duties at the State Prison? [3] A. Custody and control.

Q. What does that mean? A. Make sure they don't get out and don't get in any trouble.

Q. You are involved with the people under sentence at the ACI? A. Yes.

Q. Directing your attention to November 11th, 1972, were you on duty at the Adult Correctional Institutions that day? A. Yes, yes.

Mr. Fortunato: Will you speak a little bit louder, please?

The Witness: Yes.

Q. Which shift were you working that day? A. 4:00 to 12:00.

The Court: What is that, please?

The Witness: 4:00 to 12:00.

The Court: 4:00 p.m. till midnight?

The Witness: Yes.

Q. Do you know or are you acquainted in any way with a man named Nicholas Palmigiano? A. I have known him for about 10 years.

Q. Is he present in the courtroom today? A. Right here. (indicating)

Mr. Fortunato: He is the gentleman seated at the counsel table now.

Q. During the course of your duties on November 11th, 1972 did you [4] have any occasion to observe Mr. Palmigiano? A. Yes.

The Court: This is on November 11th?

The Witness: Yes.

Q. And as a result of your observations — and without going into any details of what you saw or did not see — did you make any charges for violations of prison rules against Mr. Palmigiano? A. Yes, I did.

Q. About what time did you make those charges? A. Oh, about — I didn't write them until after lockup.

The Court: You did not write them until after —

The Witness: — after lockup when I was free to do so.

The Court: What time was lockup?

The Witness: Supposed to be 9:00 o'clock.

Q. What time did you become free to write the charges up? A. About 9:30.

Q. And so far as the incident involved, about what you wrote the charges, what time did that incident occur? A. 10 minutes of 9:00.

Q. You say you wrote the charges up. Once you wrote the charges up, did you give the charges to anybody? A. Turned them over to Captain Brule.

Q. Did you physically write the charges up yourself or did somebody else type them up for you? A. I wrote them. [5] Q. Did you write them in longhand or type them up? A. Longhand, and they were typed by the clerk, and I signed it.

Q. Did you sign the copy that was typed by the clerk? A. Yes, I did.

Q. At what time had the clerk finished typing up the charges? A. Possibly 10:00 o'clock.

Q. Did you say you then turned those over to Deputy Warden Remillard? A. No, I gave them to Captain Brule.

Q. Captain Brule was the officer on duty that night? A. Yes.

Q. You have personal knowledge he works the same shift? A. Yes, he is my superior.

Q. Again, what time was it you gave them to Captain Brule? A. When I finished writing them: 9:30, 10:00 o'clock.

Q. Directing your attention to November 13th, 1972, did you have any occasion to appear before any disciplinary hearing board — A. No.

Q. (Continued) — to testify about what you observed? A. No.

Q. Did you have any conversation at any time whatsoever with Captain Baxter about what you observed that night? A. No.

Q. Did you have any conversation with a Mitchell Siner? A. No.

Q. And how about Norman Carney? [6] A. No.

Q. The only person you had contact with then about the charges was Captain Brule. Is that fair to say? A. I turned over the written report to him, yes.

Q. And that was your final connection with the case? A. Yes.

Mr. Allen: Your Honor please, due to some rather unusual circumstances, of which I would ask the Court to take judicial notice, — I am aware we have just sat down and just started — but my brother, Mr. Burke has just come in from working on the problems of staffing the Correctional Institutions, of which the Court may have

read in the paper. And Mr. Burke has asked me, as house counsel for the Department of Corrections, which is responsible for the operation of the ACI, that we have about a 15-minute recess so he could have an opportunity to confer with me about this case and advise me.

So I would request about a 15-minute recess, if I may. I know it is extraordinary.

The Court: Very well; we will take a 15-minute recess at this point.

(Recess)

Q. (By Mr. Fortunato) Mr. Gorton, you said that on the evening of November 11th you made a report regarding a violation that you allegedly observed committed by Mr. Palmigiano, and that the [7] clerk typed it up, and you signed a document to that effect. A. Yes.

Q. I show you a document. Can you identify that?

The Witness: When I get my glasses on.

(A pause)

A. There is some been added —

The Court: What is that?

A. (Continued) There is some been added since I put it. This here wasn't here, of course, and this wasn't here. (indicating)

Q. What is the title of that piece of paper, if you know? A. It is a booking report. We call it the book, disciplinary report.

Q. You call it the book. What would the full name of it be? A. Inmate disciplinary report.

The Court: Inmate disciplinary report.

A. (Continued) This part is mine. (indicating)

Q. About halfway down the page there is a signature on the paper. A. This? (indicating)

Q. Yes. A. That is mine.

Q. That is your signature? A. Yes.

Q. And you signed that referring to all of the typewritten words above your signature? A. This section here, yes. (indicating)

Q. Anything else below your signature you did not fill in. [8] A. No.

Mr. Fortunato: Your Honor, I am going to ask that this be marked as Plaintiff's Exhibit No. 1 for identification. At this time I would also ask that it come in as a full exhibit.

The Court: Which is it? You are offering it as a full exhibit?

Mr. Fortunato: Yes, I am.

Mr. Allen: No objection, your Honor.

The Court: Plaintiff's Exhibit 1.

Mr. Fortunato: I might state now we will have to have some other copies made, if that can be worked out with the Clerk, because I am advised this is the only copy the Attorney General's office was furnished with by their client, Warden Howard.

Mr. Allen: We have the original. We can make adequate copies for all persons.

Mr. Fortunato: I must have misunderstood, you Honor.

(Copy of document entitled "Inmate Disciplinary Report," dated November 11, 1972, re Nicholas Palmigiano, marked Plaintiff's Exhibit No. 1)

The Court: This is entitled —

The Clerk: "Inmate Disciplinary Report," dated November 11, 1972.

Q. Is that the only report that you made regarding the case? [9] A. No, I made another report of the whole incident, involving other people.

Q. But so far as Mr. Palmigiano was concerned, is that the only report you made regarding the case? A. His name was on the other report also.

Q. What names of other prisoners were on that other report, do you recall? A. There was another inmate on there: Alfredo Pelleccia.

Q. Did it arise out of the same incident?

The Court: What was that name again? Pelleccia? How do you spell that?

The Witness: I don't know.

The Court: I will take an educated guess on how to spell it.

Q. Showing you Plaintiff's Exhibit No. 1, and all the wording which is on this exhibit above your signature, is that a full and accurate statement of all the significant facts that you saw and observed? A. Pertaining to this one inmate, yes.

Q. Pertaining to that inmate? A. Yes.

Mr. Fortunato: Thank you.

Q It is true, so far as you are concerned, this is all you felt obliged to write down. A. I wrote another report too.

Q. So far as this inmate is concerned, — this is under your duties [10] at the Adult Correctional Institutions — this is what you felt obliged to put down here. A. Right.

The Court: Apart from the second report. Is that it?

The Witness: Yes.

Q. This is the report pertaining to Palmigiano, and what is the other report about? A. The other report pertains to him in part.

Q. And this is the Pelleccia report?

The Court: What?

Q. What is the other inmate's name? A. That is Alfredo Pelleccia.

Q. Did you attend any disciplinary hearings regarding Pelleccia? A. No.

The Court: Regarding Pelleccia?

The Witness: No.

The Court: Were there any disciplinary hearings regarding Pelleccia?

The Witness: Not yet, no.

The Court: He couldn't attend them then, could he?

Mr. Fortunato: I have no further questions.

Mr. Allen: No questions, your Honor.

The Court: You may step down.

Mr. Fortunato: Is Captain Baxter in the courtroom?

Mr. Burke: He is not, and I wish to explain his absence [11] to the Court.

The Court: Yes, sir.

Mr. Burke: Your Honor, I speak as — my name is Edward F. Burke. I have entered an appearance in this case and I speak as counsel for the State of Rhode Island, Department of Corrections.

Certain officers and officials of the State of Rhode Island, Department of Corrections, have been summonsed to testify in this case. I ask the Court to take judicial notice of the fact that yesterday, for a period of 24 hours, commencing at 12:01 a.m. and ending at midnight last night, the correctional officers of — large numbers of the correctional officers of the Adult Correctional Institutions reported sick.

As a result, the warden was compelled to keep on duty certain correctional officers who were on duty at midnight and to utilize superior officers of the department or supervisory personnel for the purpose of maintaining order within the Adult Correctional Institutions. In fact, Rhode Island State Police in large numbers were brought to the scene.

At midnight last night the shift scheduled to report at that time did report. There will be negotiations at 2:00 p.m. this afternoon involving the warden and other high officials of the Adult Correctional Institutions, the Governor, and the officers of the Correctional Officers Union.

Under the circumstances many of the officials, including [12] Warden Howard, worked round the clock yesterday. I am speaking in general because I am not referring just to the particular witness he just referred to, but to all the witnesses from the Adult Correctional Institutions under subpoena today.

It is the warden's feeling and the director's feeling, which I respectfully present to the Court, that because no one can predict what is going to happen this afternoon, because of the lack of rest of many of these men from yesterday, and because of the fact that orderly procedure is just now being restored in prison operations, that these men be excused from answering the subpoena until 10:00 o'clock tomorrow morning.

There were certain records that were requested to be brought. We have brought the records with us. We have brought a tape recording of the entire disciplinary board proceeding with us in response to the subpoena. But I respectfully request, in relation to the officials under the subpoena, that the matter be deferred until 10:00 o'clock tomorrow morning, at which time we will be ready to proceed.

The Court: Who are these particular individuals that are under summons? Captain Baxter?

Mr. Fortunato: Captain Baxter, your Honor, Warden Howard, and Ronald Brule.

The Court: Brule?

Mr. Fortunato: Yes. Mr. Gorton was also under subpoena.

[13] I would like to respond to what counsel just said, if I may, regarding a continuance of this matter.

Your Honor, of course, these men are all under subpoena. It was my understanding, as of our discussion in chambers yesterday when Mr. Allen was present, that if the strike were over today, we would be able to proceed

with the witnesses. And the problem, of course, in a case such as this, on the allegations made in the complaint, is that my client is now deprived of such liberties and privileges that he does have at the ACI; namely, he is under lock and key virtually 24 hours a day; does not have visitors, and all the rest of it.

We have contended this is all done without due process and we made the Fourteenth Amendment claims with which your Honor is familiar.

If I understand Mr. Burke correctly, he doesn't know what is going to happen at 2:00 o'clock, and they might go back on strike. Then where will we be tomorrow? The fact of the matter right now is people are not on strike. Captain Baxter, despite the plea of fatigue, I am advised by my client, was working at the prison as of this morning. It is only five of 11:00 right now. I don't know which of these men — I assume that the warden had to go to negotiations. I am not so sure these other people do.

We are approaching Thanksgiving on Thursday and I have asked, as I said, — I am not trying to be obstreperous here [14] or an obstructionist, or anything. But when I talked to counsel in the hallway, I said, "Look, if you need another day or two, just put Palmigiano, who has no prior problems at the prison, — put him back in the general population." They don't want to do that. They want to have their cake and eat it too.

I appreciate the burden of the state officials and the Attorney General's department, but I think sometimes private attorneys and people in the situation my client is in also face burdens, hardships, deadlines, fatigue, and all the rest of it.

I would strenuously object to any continuance. I can understand the warden not being here, but the other men are under subpoena and they should be brought here. This

is only a preliminary hearing. If they are unhappy with the results, they can pursue this to a hearing on the merits.

Mr. Burke: May I be heard just briefly in reply to what my brother has said?

We are simply requesting 24 hours in relation to complying with the subpoena. If the Court orders any of the individuals brought in, we will have them brought in as quickly as they can get here today.

I submit what is before the Court today is actually a balancing of equities. We are not asking for any untoward delay. This matter was scheduled for today. We are attempting to comply as far as the production of records is concerned.

[15] It is true Captain Brule and Captain Baxter will not participate in the negotiations. However, someone has to be left in charge of the prison while negotiations are going on. As my brother said, despite fatigue Captain Baxter is on duty today. This is correct, your Honor, but he is on duty within the prison; and what Mr. Fortunato is requesting is he be taken from that duty and brought in here at a time when the warden and top staff are all leaving right now in relation to negotiations to be held at 2:00 p.m. this afternoon.

Mr. Fortunato: I just might suggest — not to belabor the point — my client was brought in with a lieutenant who is also superior officer. I think the Court may judicially note, as far as the strike itself, Director Travisono was on television last night and was quoted in the paper that the prison functioned generally smoothly.

The Court: I am not interested in what was on television. I see no great harm in granting the request of counsel that the summons of Captains Baxter and Brule be complied with tomorrow.

Mr. Fortunato: May I request the Court order Mr. Palmigiano into the general population during this delay?

The Court: Your request is denied.

Mr. Fortunato: In that event, your Honor, we have nothing further today. I would ask that the habeas for Mr. Palmigiano to testify be continued in effect until tomorrow; [16] that he be brought in tomorrow for 10:00 a.m.

The Court: You haven't any other evidence you wish to present?

Mr. Fortunato: I don't think that I should. Because of the continuance requested by these gentlemen I don't think that I should have to put my case on out of order.

The Court: You represent the plaintiff here. The order of your witnesses is not material, it it? If you have other evidence to present, present it.

Mr. Fortunato: One moment, please, your Honor.

(A pause)

Nicholas Palmigiano.

NICHOLAS A. PALMIGIANO, Sworn

Direct Examination by Mr. Fortunato

Q. Mr. Palmigiano, you are currently detained under sentence of law at the Adult Correctional Institutions in Howard, Rhode Island? A. Yes.

Q. Prior to November 11th what classification did you have at the Adult Correctional Institutions? A. Classified to the barber shop.

The Court: What is that, please?

Q. In the barber shop, you say? A. Yes.

[17] The Court: Classified —

The Witness: — as a barber.

The Court: Classified as a barber. Had you been a barber before your confinement?

The Witness: Yes, your Honor.

Q. And so far as your contact with the rest of the inmate population, what unit were you in? A. Normal status, general population.

The Court: What is that again?

The Witness: Normal status of general population.

The Court: Normal status?

The Witness: Yes.

Q. Now would you briefly tell the Court some of the rights and privileges that go along with being in with the general status? A. Yes. Well, —

The Court: It is normal status, isn't it?

Q. General population, normal status? A. You are not confined to your cell, —

The Court: Not confined to your cell.

A. (Continued) — you are allowed visitors, meals in the mess hall.

The Court: You are allowed visitors.

A. (Continued) — meals in mess hall, recreation, and general freedom of movement.

Q. Were there any other activities at the prison that, as a member of the general population, you could engage in? [18] A. Yes, I am involved in the National —

The Court: A little louder, please.

A. (Continued) I am involved in the National Prison Reform Association.

The Court: You are involved in the —

The Witness: National Prison Reform Association.

The Court: National Prison Reform Association. Is that it?

The Witness: Yes, your Honor.

Q. How long have you been at the Adult Correctional Institutions? A. Approximately three and a half years.

Q. And from the time of your sentence until the present time —

Mr. Fortunato: Strike that.

Q. From the time of your sentence until November 11th were you in the general population, normal status? A. Yes, I was.

Q. Have you at any time prior to November 11th of this year been disciplined for any prison infractions? A. No.

Q. So it is fair to say you have a clean in-prison record. A. Yes, I have a clean record except for one incident: That there was a charge placed against me of bribery.

Q. That was — A. A criminal charge.

Q. It had nothing to do with in prison. A. It was — in prison is where I received the charge.

[19] Q. You have no disciplinary record in the prison? A. No.

TheCourt: You said there was a charge profferred against you.

The Witness: While I was in the Institution.

The Court: For some offense allegedly committed before you were in the Institution?

The Witness: No, while I was in the Institution.

The Court: A criminal charge?

The Witness: Yes, your Honor.

The Court: Is that still pending?

The Witness: Yes, your Honor. It is on appeal now.

The Court: But it was an offense allegedly committed while in prison.

The Witness: Yes, your Honor.

Q. For this offense you received no in-prison discipline? A. No.

Q. Now directing —

Mr. Fortunato: Strike that.

Q. What section of the prison do you have your cell in?

The Court: At the present time, you mean?

Mr. Fortunato: I am sorry. As of November 11th.

The Court: Prior to November 11th, up to —

Q. Up to and including November 11th what section of the prison did you have your cell in? [20] A. I believe it was South State Wing.

The Court: South State Wing, which doesn't mean much to me, I confess. What is meant by South State Wing?

The Witness: They have — your Honor, they have two sections, North State and South State, two separate blocks.

Q. And are there floors to these blocks? A. Yes, there is three tiers high.

Q. Which tier were you on? A. I was up on the third tier.

Q. How many cells would be adjoining yours in either direction and facing the same direction? A. There is eight cells on each tier.

Q. So you were one of eight cells on the third tier. Is that it? A. Yes.

Q. Directing your attention to November 11th, 1972, on or around 8:30 o'clock, quarter of 9:00, in the evening were you in the South State Wing? A. Yes, I was.

Q. And did you have any occasion to see Mr. Gorton, a correctional officer, present there — Luther Gorton? A. Yes, I did.

Mr. Allen: Object. Move to strike.

The Court: What is the basis of your motion?

Mr. Allen: Your Honor please, the allegations of the complaint are that the plaintiff has been deprived of a civil [21] right secured to him by 42 U.S. Code 1983; to wit, the right to a hearing. The subject matter underlying that hearing, it seems to me, is irrelevant and is of no assistance to the Court whatsoever. It seems irrelevant whether this man committed a physical assault or whether he did some other thing for which he was required to be disciplined or charged.

We have no objection to the admission of evidence of the charge because this is a portion of the administrative proceeding for the administration of discipline and security in the prison. However, the underlying facts, it would seem to me, are irrelevant and time-consuming and, I think, add nothing to this case.

Mr. Fortunato: Your Honor, I have no intention whatsoever of going into the incidents surrounding the infraction. I am merely trying to lay a little foundation of background so the Court generally knows who is involved in this controversy. I am not going to get into the substance of the charge and any defenses Mr. Palmigiano might have to it, or anything of that nature.

The Court: Within that limited scope I will allow it.

Q. You did see Mr. Gorton on duty that night? A. Yes, I did.

Q. Did there come a time during the course of the evening of November 11th, 1972 when Mr. Gorton, or any other correctional officer, informed you that you were in violation of some prison [22] regulation? A. Well, approximately 9:30, 25 minutes of 10:00, Mr. Gorton passed by my cell and said he would have to write a book on me.

The Court: What is that?

The Witness: He said he would have to write a book on me.

Q. Were you locked in your cell at this time? A. Yes, I was.

Q. Is that normal procedure at the prison: When the inmates go to bed they are locked in? A. Yes, sir.

Q. So you and everybody else in South State Wing were locked in. A. Yes.

Q. And Mr. Gorton passed by your cell. A. Yes.

Q. What did he say to you? A. He said he would have to write a book on me.

Q. What does that mean? A. That means that I would be put on disciplinary. He would have to write a report on me for an alleged violation.

Q. At that time did he hand you any papers? A. No.

Q. Did he tell you what the charge would be? A. No.

Q. Did you have any other conversation other than that he would [23] have to write a book on you? A. No, that is all.

Q. Did you see Mr. Gorton again that evening? A. I seen him but I didn't speak with him.

Q. Did any other officer or member of the staff at the Adult Correctional Institutions, after you were locked in your cell that evening, have occasion to come to your cell? A. Yes.

Q. Who was that? A. Captain Brule.

Q. Did you have any conversation with him? A. He came up to my cell approximately — it may have been between 11:00, 11:30, and he read the booking offense.

The Court: He read what?

The Witness: — the booking offense that Mr. Gorton had wrote.

The Court: Booking —

The Witness: Yes, the alleged offense.

The Court: Read the booking offense.

Q. Did he give you a copy of any papers at that time? A. No, he didn't.

Q. And do you recall what he told you you would be charged with? A. I believe it was creating a disturbance with a possible riot as a result of the disturbance. And he also says that I should contact my attorney because possible criminal charges may be [24] placed against me.

Q. Did you have any further conversation with him? A. No, that was all.

Q. About how long did this conversation take place? A. Approximately five minutes.

Q. And were you brought before a disciplinary board on November 13th, 1972? A. Yes, I was.

Q. And between November 11th, 1972 and the time that you were brought before the disciplinary board were you furnished with any papers informing you of any charges against you? A. I myself was never furnished with a copy of the booking. I believe a copy of the report was given to a Bobby Flint.

The Court: A copy of the report was given to a Bobby Flynn?

Q. Is that Flint? A. Flint.

The Court: Who is he?

The Witness: He is a member of the National Prison Reform Association.

Q. He is under sentence at the ACI, isn't he? A. Yes.

The Court: A copy of the report was given to Flint who is a prisoner?

The Witness: Yes.

The Court: Is his cell near yours?

[25] The Witness: No, he is in another block from mine, your Honor.

The Court: You say he is an officer of what?

The Witness: He is a member of the National Prison Reform Association.

Q. Now approximately what time on November 13th, 1972 did the disciplinary hearing commence?

The Court: How did you know it was given to Robert Flint?

The Witness: Well, your Honor, we have a procedure where the inmates may represent the inmates at a disciplinary hearing, and Bobby Flint is a member on that committee that handles all the disciplinary procedures. So it became a practice in the institution if an inmate was booked or disciplinary action being taken against him, they forwarded the reports to the National Prison Reform

Association office where the inmate has a choice. He will have either an inmate represent him or a classification officer represent him at the hearing.

The Court: You were asking a question. I interrupted you, did I?

Q. Approximately what time on November 13th, 1972 did the disciplinary hearing commence? A. I believe it was somewhere around 2:10, 2:30.

Q. Now from the —

The Court: What?

The Witness: About 10 minutes after 2:00 or 2:30.

[26] Q. From the time on November 11th when you were first advised that you would be charged until the time on November 13th when the hearing was to commence, was anything done to you in terms of your — general terms of your status at the prison? A. Yes. Captain Brule had says that in his opinion I was a definite threat to the institution.

The Court: Captain Brule what?

The Witness: In his opinion said that I was a definite threat to the institution and I was to be locked in my cell and fed in until I received the disciplinary report.

Q. So from the evening of November 11th until the hearing you were locked in your cell in South State? A. Yes.

Q. When had Captain Brule told you that he thought you were a threat to the security? A. Approximately 11:30 that Saturday evning. That would be the 11th.

Q. That would be the 11th. How many times did he come to your cell that evening? A. Once; one time.

Q. As of the time that he came that was after Mr. Gorton came? A. Mr. Gorton came by and says he would have to write a report on me.

Q. After Mr. Gorton came Mr. Brule came. A. Mr. Brule later came.

Q. Sometime around — [27] A. 11:00, 11:30.

Q. At least before midnight. A. Before midnight.

Q. And now between the 11th and the hearing did you get out of your cell for any occasions? A. Only to see my attorney.

The Court: What?

The Witness: Only to see my attorney.

The Court: When was that?

The Witness: The 12th, your Honor.

Q. Did you see any — you saw an attorney on the 12th? A. Yes. No, it was a Sunday. No. I am sorry; Monday. It would be the 13th.

The Witness: I am sorry, your Honor. It would be the 13th.

Q. Is it possible you might have seen — which attorney did you see on the 13th? A. I spoke with the — I spoke with you, Mr. Fortunato.

The Court: Is it on Sunday or Monday? The hearing was on Monday, wasn't it?

Mr. Fortunato: Right.

The Witness: This was a Monday morning, I believe. Yes, your Honor. That would be the 13th.

Q. Is it possible you saw another attorney on Sunday? A. Yes, I did. On Sunday I seen Miss Allegra Munson.

[28] The Court: That was on Saturday?

The Witness: On Sunday, your Honor.

The Court: What time was that?

The Witness: It was in the morning, your Honor, I believe; probably 9:30, 10:00 o'clock.

The Court: Wes she called by you or did someone call her to come to see you?

Th Witness: No, I had called for her, your Honor.

Q. You had called for her. When did you call for her?

The Witness: Why?

The Court: No; when and how.

The Witness: I think I called in the morning, around 10:00 o'clock.

The Court: You had access to the telephone then on Saturday morning?

The Witness: They told me that because of criminal charges, that I should contact my attorney; and they allowed me to make the phone call.

Q. They allowed you to make the phone call on Sunday morning?

The Witness: Sunday morning.

The Court: And you called Miss Munson?

The Witness: Yes, your Honor.

Mr. Allen: Just to be of assistance to the Court, I would offer to the Court Miss Munson is a member of the State Public Defender's Department, an attorney with that department.

[29] The Court: State Public Defender. I see.

Q. Between November 11th and the time of your hearing on the 13th did you have normal visiting privileges; that is, people who weren't attorneys? A. Yes.

The Court: You had normal visiting privileges in the meantime.

Q. But the major restriction then was you were confined to your cell. A. The major restriction: I was confined to the cell.

Q. You couldn't participate in any recreation or do NPRA work or anything of that nature. A. No.

Q. Directing your attention to the hearing about — approximately what time on November 13th did the hearing commence? A. I said approximately 10 minutes after 2:00 to 2:30.

Q. Who were the gentlemen that coexisted or that made up the hearing board? A. I believe Captain Baxter was the chairman, Officer Carney, and Classification Officer Mr. Siner.

Q. When you entered the hearing room did anybody accompany you into the room? A. Yes, my attorney, Mr. Stephen Fortunato.

Q. Meaning me?

The Court: Your present counsel?

[30] The Witness: Yes, your Honor.

The Court: That was in the hearing room?

The Witness: Yes, your Honor.

Q. And did any conversation ensue among the people present; namely, the hearing board, yourself, and myself? A. Yes, there was conversation.

Q. You could hear all the conversation that went on? A. Yes, I was present.

Q. Did Captain — what did Captain Baxter have to say about the people then present? A. Captain Baxter says that there are no attorneys allowed.

The Court: Baxter said —

The Witness: — that there are no attorneys allowed at these hearings and that Mr. Fortunato would have to leave.

Q. Did there come a time when you observed me leave the room? A. Yes. At that point we asked to be excused for a few minutes, and you and I —

The Court: "We," meaning whom?

The Witness: Myself and counsel.

Q. Where did we go when we left the room? A. We stepped outside the disciplinary room in what is called the rear hall.

Q. Sidetracking here for a minute, going back into the room, were any other prison officials present with Mr. Baxter, Mr. Carney, and Mr. Siner? [31] A. Yes, Deputy Warden Roland P. Remillard.

Q. He was present in the room when you first went into it? A. Yes.

Q. Going to the time when you say you and I came back out of the room, you say we stepped into the hallway. A. Yes.

Q. Did any other person join us at that time? A. Yes, Deputy Warden Remillard walked out in the — walked up to both of us. He introduced himself —

The Court: You mean he left the room?

The Witness: He left the room where myself and counsel were engaged in conversation. A. (Continued) He walked up to Mr. Fortunato and introduced himself as the deputy of the institution. At that time he says, "You may advise your client to remain mute but it would be detrimental to his defense."

The Court: "You may advise your client to remain mute but it will be detrimental to his defense"?

The Witness: Yes, your Honor.

Q. Did there come a time when Mr. Remillard absented himself from our conversation? A. Yes.

Q. And then approximately how long were you out in the hall speaking to me? A. Approximately five to ten minutes.

[32] Q. When we had concluded our conversation where did we go? A. Went back into the disciplinary room, and at that time I believe

The Court: Both of you went back into the disciplinary room?

The Witness: Yes, your Honor.

A. (Continued) And I believe at that time that Mr. Fortunato — we were recording the disciplinary proceedings.

The Court: You were what?

The Witness: We were recording, tape recording.

The Court: Who was recording?

The Witness: We were, yuor Honor.

The Court: Meaning whom?

The Witness: National Prison Reform Association; namely, Robert Flint.

The Court: What?

The Witness: Robert Flint.

The Court: Was he there too?

The Witness: Yes, your Honor.

The Court: Was he in the room?

The Witness: Yes, your Honor.

The Court: What was he doing in there?

The Witness: He was recording the proceedings.

Q. As you sit here today, that is your present recollection of what went on in these proceedings that we have been discussing? A. Yes.

[33] Q. After our conversation you say you and I both went back into the hearing room. A. Yes.

The Court: Flint had some sort of recording device?

The Witness: Yes, he had the tape recorder there, your Honor.

Q. And what was the substance of any conversation that you recall took place at that time? A. Well, to the best of my recollection I believe there was some stating about we did not recognize this as a disciplinary board.

The Court: What is that again?

The Witness: About that we did not recognize this as a disciplinary board.

The Court: Who is "we"?

The Witness: My attorney.

The Court: Who made the statement?

The Witness: Mr. Fortunato.

The Court: — made the statement that he did not what — give it to us again.

The Witness: — recognize this as a disciplinary board.

The Court: Yes?

The Witness: And I don't recall the entire conversation, your Honor. A. (Continued) Then after the conclusion of that conversation —

The Court: There was more to it than that, wasn't there?

[34] The Witness: Yes, your Honor, but I don't recall it verbatim.

The Court: What?

The Witness: I don't recall it verbatim actually what took place.

Q. Tell the Court what the substance of the conversation was. A. We strongly objected —

The Court: "We," meaning you and your counsel?

The Witness: Yes, me and my counsel.

A. (Continued) We strongly objected to the fact that my attorney could not remain present during these proceedings and that we are going to proceed with the hearing.

The Court: "We are going to." Meaning you?

The Witness: Yes, your Honor.

A. (Continued) So at that point we asked to be excused again for a few minutes and we went back out into the corridor. And on advice of my attorney, you know, I remained mute at the hearing.

The Court: You went back into the corridor?

The Witness: Yes, your Honor.

The Court: Then what?

The Witness: On advice of my attorney I remained mute. He left and I went back into the disciplinary board.

Q. As a result of the second conversation that took place in the hallway between you and me, was it the intention then to go through the hearing but to remain mute? [35] A. Yes.

The Court: What is that?

Q. Was it the intention for you to go back in and sit through the hearing but to remain mute? A. Yes.

Q. Did you in fact go back into the hearing room? A. Yes, I did.

Q. And at that time the hearing board was sitting? A. Yes.

Q. Namely Mr. Baxter, Mr. Carney, Mr. Siner? A. Yes.

Q. And you were not accompanied into the room at this time by me? A. No, I wasn't.

Q. Nor by any attorney? A. Nor by any attorney.

Q. What if anything did the members of the board have to say to you? A. Captain Baxter read the offense —

The Court: Captain Baxter read —

The Witness: — read the offense.

The Court: — read the statement of the offense?

The Witness: Yes.

A. (Continued) — and asked me if I was going to answer any questions. And at that time I again requested permission for my attorney to be present. He said, "Your request is denied." I says, "I remain mute." And then at that point he asked me to [36] step out of the room, which I did for approximately three to four minutes. And then I got called back into the disciplinary room. I sat down, and Captain Baxter says, "We find you guilty." He says, "We sentence you to 30 days, BCU, and possible downgrade in classification."

Q. Now while you were in the room, after you had talked to me for the second time and had gone back in, and right after Captain Baxter read you the charges, did any other officer of the Adult Correctional Institutions come forward to testify before this board? A. No.

Q. Did any inmate at the Adult Correctional Institutions testify at this board? A. No.

Q. Now on both these occasions I mean did anybody — officer of the Correctional Institutions or inmate at any time testify for or against you at this board? A. No.

The Court: You are telling me that no testimony whatever was presented?

The Witness: None, your Honor.

Q. Were any photographs presented into evidence in front of this board? A. No.

Q. Were any tape recordings presented into evidence at this board? [37] A. No.

Q. Did Captain Baxter or any other official present tell you that you had a right to remain silent? A. No.

Q. Did anybody tell you that anything that you said in those proceedings might be and perhaps would be, could be, used against you in a future criminal proceeding? A. Yes, Captain Baxter.

The Court: Captain Baxter told you what?

The Witness: That anything that I say here may be used against me in a court of law.

Q. Were you told that you had the right to counsel? A. No.

Q. Were you told that if you could not afford counsel, counsel would be provided for you? A. No.

Q. Now is it fair to say then that after the charges were read to you and after you said that you wanted to — you were going to remain silent, you were then told to remove yourself from the room? A. Yes.

Q. How long did you remain outside the room? A. Approximately three to four minutes.

The Court: Did you have to go back in?

The Witness: They called me.

[38] Q. When you got back into the room, who if anybody spoke to you? A. Captain Baxter.

Q. What did Captain Baxter say? A. Well, his exact words was "We find you guilty; 30 days BCU, possible downgrade in classification." And at that time he asked: Do I appeal.

The Court: He did what?

The Witness: At that time he asked if I appealed.

A. (Continued) Bobby Flint, who was recording the entire proceedings, says that he strenuously objected to the entire proceedings of this board.

The Court: Flint said he did?

The Witness: Yes.

A. (Continued) And Captain Baxter immediately said, "Your appeal is noted." And I was sent back to my cell under the same status: Locked and fed.

The Court: When you were asked if you appealed, what was your answer?

The Witness: I remained mute, your Honor.

The Court: You remained mute?

The Witness: Yes.

The Court: You didn't answer that question either?

The Witness: No.

The Court: Then you said Flint said he —

The Witness: Bobby Flint said he objected strenuously to [39] the entire proceedings.

The Court: What standing did he have to object? What was he doing there anyway?

The Witness: He was there as an NPRA representative, your Honor, which is a procedure that has been established at the institution.

Q. Now you said that you were sentenced to 30 days at the BCU. What is the BCU? A. Behavior Correctional Unit. I was sentenced to — actually it is the hole, but they call it the Behavior Correctional Unit.

The Court: Behavior —

The Witness: Behavior Correctional Unit.

The Court: You say actually it is the hole?

The Witness: Yes, Your Honor.

The Court: Meaning what?

The Witness: Well, you know, you are confined 24 hours a day. You are not allowed cigarettes, visits. You are allowed to receive mail and send mail. And you are allowed — and the only visits that you are allowed is an attorney.

The Court: The only visitor you are allowed —

The Witness: — is an attorney.

Q. Are you presently in this Behavior Correctional Unit? A. Yes.

Q. And since what date have you been there? A. The date — I believe it was Tuesday, the 14th.

[40] Q. Since Tuesday, the 14th, you have been there and you are still there now. A. Yes.

Q. And you have never left that place in between the 14th and today's date? A. No.

Q. Obviously to come here. But when you are out there, you are in the Behavior Correctional Unit? A. Correct.

Q. Now when Captain Baxter said that they found you guilty and that you were going to be sentenced to the BCU and perhaps be downgraded, what does the downgrading mean? A. Possibly classify me back in BCU.

Q. In other words, keep you there after the 30 days? A. Keep me there after the 30 days.

Q. If you know, would you tell the Court whether or not these disciplinary proceedings and findings become part of your permanent record at the ACI? A. Yes, it does.

Q. Will that be furnished when and if you become eligible for parole to the Parole Board? A. I believe it will.

Q. Now when Captain Baxter said that you were guilty and explained the sentence to you, did he at that time give you any piece of paper? [41] A. No.

Q. Have you ever received a piece of paper setting forth the decision and any reasons for the decision? A. No.

Q. Did Captain Baxter tell you any reasons for his decision? A. No.

Q. Did he tell you any facts that they had concluded against you? A. No.

Q. Now did there come a time when Warden Howard reviewed the findings and the sentence of the disciplinary board? A. Well, I couldn't actually say if he reviewed it, but approximately 5:00 o'clock, Tuesday, the 14th, an officer came up to my cell and said that the warden wanted to see me.

The Court: An officer came up to your cell and said that the warden wanted to see you?

The Witness: Yes, your Honor.

A. (Continued) I was brought to the deputy's office with Lieutenant Detonnancourt, and Warden Howard says, "I am here on your appeal"; and he says, "I am going to deny the appeal." I says, "Okay," and I went down to the BC Unit from there.

Q. From your conversation with the warden you went right to the BCU? A. Right to the BCU.

Q. While you were present with the warden did anybody, inmate or guard, testify for or against you? [42] A. No.

Q. Were any pictures or tapes offered into evidence against you? A. No.

The Court: That is while he was with Warden Howard?

Mr. Fortunato: While he was with Warden Howard; yes, sir.

Q. Did the warden hand you any piece of paper at that time? A. No.

The Court: What do you mean by a piece of paper?

Mr. Fortunato: Just did he give him any papers or documents at that time? A. (Continued) No.

Q. At any time have you received any papers or documents from the warden regarding your confinement in the BCU? A. No.

Q. Did the warden tell you any reosons why he was going to uphold the board? A. No reason.

Mr. Fortunato: I would like a moment, please, your Honor.

The Court: Certainly.

(A pause)

Q. Did the warden, when you were brought before him, — did he tell you you had a right to remain silent? A. No.

Q. Did he tell you anything you said might be used against you in a court of law in future criminal proceedings? [43] A. No.

Q. Did he tell you you had a right to counsel? A. No.

Q. Did he tell you you had a right to appointed counsel if you could not afford one of your own? A. No.

Q. What documents or papers of any type have you been furnished directly by any prison official regarding the disciplinary proceedings resulting from the incident of November 11th? A. None whatsoever.

Mr. Fortunato: I have nothing further.

Cross-Eximination by Mr. Allen

XQ. Mr. Palmigiano, you are, of course, the same person who was sentenced by the Superior Court for Providence County, State of Rhode Island, on September 14th, 1970 to life? A. Yes.

XQ. And you have since been found guilty by a jury in Providence County Superior Court of attempted bribery, have you not?

Mr. Fortunato: Objection, your Honor.

Mr. Allen: I don't think the appeal prevents my asking that question.

The Court: Ordinarily a conviction is to be shown for one purpose and that is to impeach a witness's credibility. And unless and until a conviction is final, I don't think it is [44] a proper basis for use for impeachment purposes.

Mr. Allen: Very good, your Honor.

XQ. Now let's talk about you for a minute, Mr. Palmigiano. You were for a long time the president of the prison Jaycees, weren't you? A. Yes.

Mr. Allen: Speak right up so the Judge can hear you, if you will, please.

XQ. And you subsequently were one of the founders of this organization called National Prison Reform Association. A. Yes.

XQ. And you are presently the president of it. A. Yes.

XQ. You were also the plaintiff in a class action, a civil rights action, which was called *Palmigiano* v. *Travisono*. Is that right? A. Pertaining to the National Prison Reform Association or an A-and-T case?

XQ. An A-and-T case. A. *Palmigiano* v. *Travisono*.

The Court: What is that again?

The Witness: *Palmigiano* v. *Travisono*.

Mr. Fortunato: Reported at 317 F. Supp., I believe, your Honor.

XQ. And you were a subscriber to the National Prison Reform Association case in this court, weren't you? [45] A. Yes.

XQ. You have been very active in prisoners' civil rights, haven't you, Mr. Palmigiano, ever since you went there? A. Yes.

XQ. Mr. Palmigiano, you recall a year or so ago —

The Court: A year or so ago? That would be November '71.

XQ. (Continued) — that this court adopted a document, a preliminary document, called the Morris Rules. Do you remember that?

Mr. Fortunato: Objection.

The Court: What is the objection?

Mr. Fortunato: I don't think it has been established he was a plaintiff in that matter.

Mr. Allen: I am not asking him that question.

Mr. Fortunato: Then I think it calls for a conclusion on law and administrative regulations by a non-expert.

Mr. Allen: I asked him whether he became aware of the Morris Rules, your Honor.

The Court: I think that is a fair inquiry.

A. Yes.

XQ. In fact, isn't it so, Mr. Palmigiano, you became intimately familiar with the originial Morris Rules yourself? A. No.

XQ. No? Now subsequently you became aware that this court approved a final draft of the Morris Rules. Is that correct? You became [46] aware of that? A. That this court approved a final draft of the Morris Rules?

XQ. Yes. A. Yes.

XQ. I am going to show you a document and ask you if you can tell what it is. Do you recognize that document? A. Yes, this is the new rules that the court adopted.

XQ. Those are the Morris Rules, aren't they? A. Those are the Morris Rules.

Mr. Allen: I would ask they be marked for identification at this time, your Honor.

The Court: They may be marked Defendants' Exhibit A for identification.

The Witness: Your Honor is it permissible if I have a minute with my attorney?

The Court: What is that?

The Witness: Is it permissible if I ask for a moment with my attorney?

Mr. Allen: This man is under cross-examination.

The Court: No, you are under cross-examination. You are the witness.

Defendants' A for identification.

(Copy of document entitled "Regulations Governing Disciplinary, Classification, and Mail Procedures for

all Inmates at [47] the Adult Correctional Institutions, State of Rhode Island," marked Defendants' Exhibit A for identification)

XQ. Do you own a copy of those rules, Mr. Palmigiano? A. I have a copy of it, yes.

XQ. Now you are the president of National Prison Reform, aren't you? A. Yes.

XQ. And you have been since its founding. A. Yes.

XQ. Will you tell the Court more in —

Mr. Allen: Well, I will withdraw that question.

XQ. Now did you become aware in advance of the adoption of Respondents' Exhibit A for id. by this court — did you become aware that this court invited comment on the rules? A. The best of my recollection: These adopted rules — they were strongly protested by the inmates.

The Court: They were what?

The Witness: They were strongly protested and objected to by the inmates and by the plaintiffs of the original petition against — Morris v. — I believe it was Affleck at that time.

The Court: That is something somebody told you?

The Witness: No, this is something I myself objected to — some of these proceedings.

XQ. You yourself objected to some of the rules?

The Witness: Yes.

[48] The Court: Those rules were approved by Judge Pettine.

The Witness: They were approved by Chief Judge Raymond J. Pettine; yes.

XQ. You at no time elected to be excluded from the class of persons in that lawsuit, did you?

Mr. Fortunato: Objection.

Mr. Allen: That is a factual matter, your Honor. It is a Rule 23 —

Mr. Fortunato: I think it is irrelevant to the proceedings now going on in this court, your Honor.

The Court: I can conceive where it might have some relevancy. The witness has said he objected to at least some of these rules.

The Witness: Yes, your Honor.

XQ. Now I am asking you, Mr. Palmigiano: Did you elect to be excluded from the class of persons covered by those rules? Did you file a notice with this court asking to be excluded from the class? A. No.

Mr. Fortunato: Objection.

The Court: You said you didn't?

The Witness: No.

The Court: He did not.

XQ. Now since the National Prison Reform Association has come into being and you have taken responsibility for the presidency of it, [49] will you tell the Court in some detail to what extent the National Prison Reform Association under your leadership takes some responsibility or some leadership in administering the Morris Rules? What do you do? A. Well, in answer to that question, the National Prison Reform Association had cards printed up for the entire population in regards to the booking procedures and the Morris Rules. We inform all our members and all the inmates of the institution that if he was under any disciplinary proceedings, if an officer was writing up a book against him, not to compound the incident, not to give the officer any backtalk, and he would contact one of the NPRA members for assistance.

We recently had a meeting with — Mr. Burke, I believe, was present and a few other gentlemen on the entire Morris rulings. And we have a complete transcript of them rules.

XQ. Now when you had Bobby Flint in the hearing room with you, that was pursuant to this arrangement that you

set up — the NPRA set up with the prison authorities, wasn't it?

Mr. Fortunato: Objection.

A. No, it wasn't.

Mr. Fortunato: Objection. I move to strike to the degree the answer has been recorded.

The Court: What is your objection?

Mr. Fortunato: Relevancy, your Honor. Whatever the rules now in force might be or this man's understanding of them, I [50] don't think that they are germane as far as his understanding is concerned to the question that this Court faces regarding violations of due process that we allege in a situation where, again, we allege that a man is faced with disciplinary proceedings at the same time that he is faced with criminal proceedings, and where we also allege that there was no evidence whatsoever produced against him.

In other words, I think the complaint on its face does not quibble about the nuances of the Morris Rules, but gets into issues other than this line of questioning.

So that is why I press my objection, your Honor.

Mr. Allen: Your Honor please, one of the thrusts of this complaint has been lack of representation. I am trying to show, and I think I will show, either through this witness or other, that this witness, this plaintiff, has made his own bed with a great deal of enthusiasm and now he finds it isn't as comfortable as he thought it was, and he is asking the Court to undo his own concoction.

The Court: There is no jury here and I think I can sift out any evidence that has no bearing. I am inclined to allow the question.

"When Bobby Flint was in the hearing room . . ." What was the balance of the question?

(Last question and answer read)

Mr. Allen: All right, Mr. Palmigiano.

[51] XQ. After these rules became effective you testified on direct examination that you made an arrangement with the classification officers that the notice, instead of going to the prisoner, goes to the NPRA, and you are the president of the NPRA. Didn't you testify to that effect?

Mr. Fortunato: That is a misstatement of what he testified to.

The Court: Substantially that is what my recollection was.

Mr. Fortunato: He said that Flint got it, but I don't know whether he said anything about pursuant to an arrangement he had made with Flint or anybody else.

Mr. Allen: I press my question.

The Court: If there is any doubt, let's have the record checked. My notes indicate there was an arrangement whereby the complaint was not to be given to the prisoner, but, rather, to the Association.

(Previous testimony read as follows:

"The Court: How did you know it was given to Robert Flint?

"The Witness: Well, your Honor, we have a procedure where the inmates may represent the inmates at a disciplinary hearing, and Bobby Flint was a member on that committee that handles all the disciplinary procedures. So it became a practice in the institution if an inmate was booked or disciplinary action being [52] taken against him, they forwarded the reports to the National Prison Reform Association office where the inmate has a choice. He will have either an inmate represent him or a classification officer represent him at the hearing.")

The Court: That was my recollection of his testimony.

Mr. Allen: I press my question. May I have the question read back, please, your Honor?

(Last question read)

A. Yes.

XQ. So that the reason Bobby Flint got the notice, and not you, is because it was consistent with a system which you yourself had devised. Isn't that correct? A. Yes.

XQ. And that is in turn consistent with Rule G on page 17 of the Morris Rules, is it not?

The Court: Rule what, G?

Mr. Allen: G as in "George," your Honor.

The Court: Page 17?

Mr. Allen: On page 17.

A. Yes.

XQ. And your attorneys, Mr. Coen and Mr. Roney, subscribed to these rules, did they not?

Mr. Fortunato: Objection, your Honor.

The Court: What is the objection?

[53] Mr. Fortunato: I am somewhat confused. I am not sure any foundation has been laid regarding his relationship to any other attorneys in any other case and what they were authorized to do, to not do, to bind this man in all circumstances, in all proceedings, that take place at the ACI.

Mr. Allen: It was a Rule 23 class action. This court formed the class, of which this plaintiff was a member, and he is bound by that judgment. And his counsel agreed to these rules. In fact, they participated in drafting them.

The Court: A moment ago you pointed out some subdivision on page 17.

Mr. Allen: G as in "George," your Honor.

The Court: "Any inmate being charged . . ."?

Mr. Allen: Yes.

The Court: A while back I understood the witness to deny he filed a motion to be excluded from the class of plaintiffs in the Palmigiano suit;—

Mr. Allen: That is right, your Honor.

The Court: — that he was a member of that class; it was a class action. And counsel for the class were who?

Mr. Allen: Coen and Roney, your Honor.

The Court: For whatever limited weight may be properly afforded to it, I think it is proper inquiry. I will allow it.

Mr. Allen: Excuse me, your Honor.

[54] (a pause)

The Court: Is there a question pending?

Mr. Allen: I don't believe so.

(Last question read)

Mr. Allen: I am sorry.

The Court: If he knows, he may answer.

A. Over our objections.

The Court: Over "our" objections?

The Witness: Yes, your Honor.

XQ. Now I want to clear something up for the Court.

The Court: You say, "Over our objections." Whom do you mean, yourself personally?

The Witness: Mine and some of the plaintiffs' that originally —

The Court: Some of the plaintiffs'?

The Witness: Yes, your Honor.

XQ. Now, Mr. Palmigiano, I want to clear up one thing that might be confusing the Court here. Prior to November 11th you were classified in general population. Is that correct? A. Yes.

XQ. But you were classified to the maximum security building, were you not? A. Yes.

XQ. You were a maximum security prisoner. A. Yes.

[55] XQ. When you referred to South State, that is just a portion of the gray building where your cell is located. A. Yes.

XQ. And you have been a maximum security prisoner for how long? A. Three and a half years.

The Court: Since your commitment, you mean?

The Witness: Since my commitment.

Mr. Allen: I would ask the Court while I am asking the next question perhaps to — I invite the Court's attention to Section I on page 17 of Respondents' Exhibit A for identification.

XQ. Were you advised that statements you make in your defense in a disciplinary hearing were probably not admissible at a trial or were you told they might be admissible? A. I was told they may be admissible.

XQ. And you were told that you might wish to consult an attorney to determine what to do, weren't you? A. I was told to contact my attorney.

XQ. Right. So you are familiar with Section I, aren't you? A. No, I am not.

XQ. Now during the hearing before Captain Baxter Flint was there to represent you or assist you, wasn't he? A. No, he wasn't.

XQ. What was he there for then? A. He was there to record the proceedings.

The Court: Was that customary practice, that each such [56] proceeding would be recorded by Mr. Flint?

Mr. Allen: That is covered by the rules, your Honor.

The Witness: Well, by someone.

The Court: It was their duty to record your proceeding?

The Witness: Yes, your Honor.

XQ. Now when you went in there the first time, you elected to give no testimony yourself. Isn't that right? A. On advice of attorney, yes.

XQ. Did you request that any witnesses be called and interrogated on your behalf, as provided in the rules? A. I stated at the beginning that I — on advice of attorney I remained mute.

The Court: That isn't an answer to the question, is it? A. (Continued) No, I didn't call anybody.

XQ. You didn't request any witnesses to be called for your — A. Nope.

XQ. Did you know that you had that right? A. Yep.

The Court: What is that?

The Witness: Yes, sir.

Mr. Allen: Now one final thing I want to ask you about. My co-counsel has suggested that I note for the record that on page 18 of Respondents' Exhibit A, paragraph No. 10, at the bottom of the page reads substantially that an inmate may request that a recording be made of the hearing.

[57] XQ. Now, you know, I am a little puzzled. Maybe you can help me out, Mr. Palmigiano. You told this Court that you were locked up on the night of the — Saturday night, the 11th, and that was right after the incident with Luther Gorton. Right? A. Yes.

XQ. And you told this Court that you saw Allegra Munson on Sunday and Stephen Fortunato on Monday. Am I to understand you are telling the Court you didn't talk to anybody else during that time? A. I talked to Larry Schwartz.

XQ. How often did you see Larry Schwartz during that time? Maybe we had better for the Court — who is Larry Schwartz? A. Larry Schwartz is treasurer of the National Prison Reform Association at the ACI.

The Court: You talked to Larry Schwartz and he is treasurer of the National Prison Reform Association?

The Witness: Yes.

The Court: Is he an inmate out there too?

The Witness: No, he is not.

XQ. He is a social worker from the — A. Providence Corporation.

XQ. (Continued) — Providence Corporation, isn't he?

The Court: Social worker. How often did you talk to Larry?

A. During the time I was locked up or in general?

[58] XQ. Between November 11th, Saturday night, when you were locked up, till the time of the hearing, the 13th, Monday. A. I talked to him Sunday and I believe I talked to him Monday afternoon.

XQ. During the time you were locked up were you furnished a paper and pencil or paper and pen or typewriter and paper? A. I was in my cell. I had access to any and all materials I needed.

XQ. You have a full supply of stationery materials for your own purposes in your own cell? A. Yes, I do.

XQ. Does that explain why, when I was flying to Washington on Monday morning, I read a long press release issued by you?

Mr. Fortunato: Objection.

Mr. Allen: He is testifying he is locked up. Now I am trying to bring out how much he actually is locked up.

Mr. Fortunato: Your Honor, we are talking about the gravamen of the case before the Court, the BCU and how he got there, or November 11th to November 13th. Furthermore, the relevancy of what the press has — I think the Court indicated earlier this morning you are not particularly interested in what TV says. I am not so sure that the newspaper report is at all germane to the proceedings at bar.

Mr. Allen: I am not in the slightest interested in what he said to the paper. I am interested in bringing out the [59] extent to which he is a truth teller. He has testified to the Court he was locked up during this three-day period — 2 and ½-day period, and I am trying to bring out exactly to what extent he was locked up. I think if he has access to the Providence Journal — I suggest to the Court that his lockup isn't very severe.

The Court: Only a short while ago, Mr. Fortunato, you were doing your best to impress upon me that if this hearing could not be completed between now and Thanksgiving, this prisoner was suffering beyond all endurance by being denied substantially any and all privileges. I take it even though he is in this new section, he does have the right to visitors; he does have the right to send out letters.

Mr. Fortunato: This is where I am afraid the matter is becoming a little muddied. In the section he is in now, and the one he has been in from the time of his sentencing, I believe his testimony was no visitors other than attorneys. He can write out. What his privileges are coming in, I don't believe —

The Court: That is where he is presently locked up?

Mr. Fortunato: We can cover that on —

I think the objection is pending to the question on sometime between the 11th and the 13th — something about Mr. Allen flying to Washington and reading about things.

The Court: I will allow it. Let's have the question. [60] The Witness: The question was about the press release, your Honor.

A. The warden of the institution refused me permission to speak to the reporters. Bobby Flint gave the press release.

XQ. Do you deny that you prepared a press release? A. Yes, I do.

The Court: It was prepared by Flint, in other words?

The Witness: Yes, the warden refused me access to talk to the reporter.

XQ. You prepared no press release? A. No.

XQ. Did someone else prepare it under your direction and supervision? A. No.

XQ. Did someone prepare it at your direction? A. It was prepared with my consent, yes.

The Court: It was prepared with your consent?

The Witness: Yes.

The Court: At your request?

XQ. By whom? A. Bobby Flint.

XQ. Did you confer with him about it? A. No.

XQ. How did you give your consent? A. I was asked about a press release, and I says okay.

The Court: What is that?

[61] The Witness: I was asked if we — I wanted to give a press relase on the story.

The Court: Asked by whom?

The Witness: Robert Flint.

A. (Continued) And I says — I contacted the warden to find out if I could speak to the reporter, and the warden says he wouldn't allow me to talk to the reporter; he would allow Bobby Flint and Ronald Johnson.

XQ. Well, did you suggest or direct or in any way encourage Johnson or Flint to release the statement in your name? A. I don't know what you mean by if I encouraged them. They made the release with my consent but I wasn't there to prepare the release.

XQ. As I was flying in the plane and reading, the Journal said: "Palmigiano says; Palmigiano says." Did you in any way aid, abet, encourage, dream up, or permit the Providence Journal to say, "Palmigiano says"? A. No, I didn't prepare the press release.

XQ. Mr. Palmigiano, I am asking you: Did you tell Flint to release it in your name, to have it say, "Palmigiano says"? Yes or no?

Mr. Fortunato: Objection, your Honor. I ask such answer, if there was, be stricken, I think that is argumentative.

The Court: It is proper questioning.

A. He had my consent to make a press release. It is as simple as that.

[62] XQ. Did you tell Flint: "Use my name"? A. Yes.

XQ. Did you tell him what to say you were saying? A. No.

XQ. Did you give him any idea what to say you were saying? A. No.

XQ. Did you see the press release in print? A. Yes.

XQ. And it quoted you verbatim, didn't it, or purported to? A. I don't believe it did.

Mr. Allen: Your Honor, I am going to suspend cross-examination at this time. It is the lunch hour anyway. And I would like to see what this fellow really is up to here because my recollection of it — and it is only a week ago — my recollection is that press release was issued with quotation marks. And the Providence Journal is rather cautious about this matter. They don't put quotation marks in unless they have got good authority for it.

So I would ask leave to suspend cross-examination at this time.

The Court: Are there not any other matters you wanted to inquire into?

Mr. Allen: No, this was the last matter.

(A pause)

XQ. So we now have two areas in which Flint was involved with you: [63] In terms of this press release and in terms of making the recording in the hearing room. You requested Flint to make that recording? A. Yes, I did.

XQ. So you saw Flint sometime during the November 11th to 13th period when you were allegedly locked up. You saw him and conversed with him about making a tape recording. A. To clear up the situation for the Court, when I was confined to my cell on the 11th any and all inmates in the institution wishing to speak to me, could come up to my cell. I wasn't segregated at the time. So it is a situation if Bobby Flint or an other inmate in the

institution wanted to convey with me about any matter, they could come up to my cell.

XQ. And they did. A. And they did.

XQ. On how many occasions? A. They kept coming back and forth all day long.

XQ. All day long? A. Different inmates.

XQ. On Sunday? A. Sunday also, yes.

XQ. And on Monday? A. Yes, Monday.

XQ. So you were a pretty busy guy on Sunday and Monday, weren't you?

Mr. Fortunato: Objection.

[64] The Court: I will sustain the objection.

XQ. You discussed during that period of time the conduct of the hearing with Flint too, didn't you? A. No, I didn't.

XQ. You just told us you asked him to record it. A. Yes.

XQ. Did you mention the hearing in any other way to him? A. No, I had no idea what course I was going to take at that time.

XQ. Did you discuss it with him? A. No.

XQ. You asked him to record it? A. Yes.

XQ. Did you ask him to be present in the room? A. How else could he record it?

The Court: What is the answer?

The Witness: How else could he record it?

XQ. Who owns the recording machine? A. Mr. Larry Schwartz.

XQ. Did you say — when you saw Larry Schwartz, you asked him for the tape recorder? A. We have one of our own that is out on repair, and I asked Larry if he would bring his own in for us.

XQ. Did he agree to do that? A. Yes, he did.

The Court: This machine belonged to Schwartz?

[65] The Witness: Yes, your Honor.

The Court: You saw him on Sunday?

The Witness: Yes, your Honor.

XQ. Did he bring the recorder to you on Monday? A. He gave it to one of the superior officers.

XQ. And did he bring it to you? A. He didn't bring it to me; he gave it to one of the superior officers.

The Court: How do you know that?

The Witness: He told me.

XQ. How did you come into possession of the tape recorder? A. It was never in my possession.

XQ. Did you tell someone to give the tape recorder to Flint? A. The — we have permission under the rules to tape-record any disciplinary proceedings. We have our own recorder that is broke, and I asked Larry Schwartz if he would bring his own in, which he did. And he turned it over to one of the superior officers, and one of the officers in turn — which one I have no idea — turned it over to Bobby Flint.

XQ. And Flint used it at the hearing? A. Yes.

The Court: I take it this request of Schwartz was made on Sunday?

The Witness: Yes, it was.

The Court: This incident, this booking, occurred Saturday [66] night?

The Witness: Saturday night, your Honor.

The Court: Schwartz was in to see you on Sunday?

The Witness: Yes, your Honor.

Mr. Allen: Your Honor please, at this point I have nothing more to inquire about except the inconsistency that I mentioned a moment ago. And I would therefore ask to suspend cross-examination and ask for a continuance for the reasons urged earlier by my brother, Mr. Burke, until 10:00 a.m. tomorrow morning — unless my brother —

The Court: If Mr. Fortunato has some other testimony to present, I want to continue with this hearing. It is the

type of case that is entitled to a hearing, and let's have it.

Have you got other testimony to present this afternoon, Mr. Fortunato?

Mr. Fortunato: May I have a moment, please, your Honor?

(A pause)

Mr. Fortunato: Your Honor please, needless to say, I would like some redirect with Mr. Palmigiano. I wonder if we could resume at 2:00 o'clock, and in the interim perhaps Mr. Allen could get the press release, if that is what is causing the delay now.

The Court: Will you have further testimony at 2:00 o'clock?

Mr. Fortunato: I believe I will, your Honor.

[67] The Court: I would like to ask the witness one or two questions, in any event, if that doesn't interfere with Mr. Allen's program.

Was Flint there merely to record this hearing before the board?

The Witness: Yes, your Honor.

The Court: And he was there for no other purpose?

The Witness: No, your Honor.

The Court: You have testified, have you not, at the close of the hearing and the announcement of the board's decision you were then asked if you claimed an appeal?

The Witness: Yes, our Honor.

The Court: Did you not tell us that Flint at that time stood up and said he objected to the entire proceedings?

The Witness: Yes, he did, your Honor.

The Court: If he was there merely to record the proceedings, what was he doing objecting? Wasn't he acting as your representative?

The Witness: I think, your Honor, he was so upset with the proceedings and the sentence.

The Court: You think he was so upset?

The Witness: In my opinion, yes, your Honor. I think he was upset and it was like a spontaneous reaction on his part.

The Court: But he did arise and object strenuously to the proceedings.

[68] The Witness: Yes, he did, your Honor.

The Court: And criticized them adversely.

The Witness: Yes, your Honor.

The Court: We will stop here, gentlemen, until 2:00 o'clock. The witness is still under cross-examination.

Mr. Fortunato: So there won't be any misunderstanding, my plan at 2:00 o'clock is, hopefully, Mr. Allen will have the press release; and then I will probably be 25 or 30 minutes on redirect. I might have another short witness.

The Court: We won't put any time limitation on you. I just want to go as fast as we can. We will stop here then until 2:00 o'clock.

(Noon Recess)

AFTERNOON SESSION

2:00 P.M.

Mr. Allen: At this time I am prepared to go forward with the cross, your Honor.

The Court: Very well.

Mr. Allen: First of all, I want to apologize to the Court, and, I suppose, counsel. My memory of what I had read in a newspaper was in error. The article does refer to Mr. Palmigiano, but the person quoted at length is Mr. Flint, not Mr. Palmigiano.

The Court: Very well. The record will so indicate.

[69] XQ. (By Mr. Allen) Now, Mr. Palmigiano, let me ask you: You were in that hearing room at all times that Flint was, weren't you? A. Yes.

XQ. And were you situated in the hearing room in a place where you could hear — as far as you know — every word that Flint said? A. Yes.

XQ. Do you believe that you did hear every word that he said in that room? A. To the best of my recollection, yes, I would say I did.

XQ. And you didn't protest or object when — you, Mr. Palmigiano, did not protest or object when Flint said to the board that he was your advocate, did you?

Mr. Fortunato: Objection. He misstates the testimony.

Mr. Allen: I am prepared to play the tape at this time.

Mr. Fortunato: That seems to me improper procedure at this juncture of the proceedings.

Mr. Allen: He has testified this man was in the room for the sole purpose of running the tape recorder. I have heard the tape and I am going to ask him some questions about what is on that tape.

Mr. Fortunato: There has been testimony by Mr. Palmigiano that Mr. Flint played the tape —

The Court: Played the tape?

Mr. Fortunato: — used the tape recorder in order to record the proceedings.

[70] The Court: To record everything that was said.

Mr. Fortunato: After Mr. Palmigiano was informed of the findings of the board and the sentence of the board, Mr. Flint then objected strenuously to the board's proceedings and also claimed an appeal on behalf of Mr. Palmigiano. I believe counsel —

The Court: I don't know that he said that yet.

Mr. Fortunato: No. That Flint claimed an appeal. He did not say he was counsel for Palmigiano.

The Court: I don't know that he said that. He said Flint criticized very vigorously the findings and conclusion of the board. I didn't hear him say Flint claimed an appeal.

Mr. Fortunato: At no time has Mr. Palmigiano said Mr. Flint made a representation that Flint was there to be his advocate.

The Court: I think that is a proper field of inquiry for counsel for the defendants.

Mr. Fortunato: I think it is an area of inquiry but that the evidence was misstated when the question was put to Mr. Palmigiano.

Mr. Allen: Your Honor will recall your Honor yourself inquired as to this matter just before we went to lunch. And my recollection is — my trial notes say he answered your Honor's question that Flint was not his attorney. That is what the trial notes show his answer this morning to be.

[71] The Court: You may pursue it. Go ahead. Get back to the proper foundation for this line of questioning.

XQ. I will ask you again, Mr. Palmigiano: Was Flint in there as your attorney? A. No, he wasn't.

XQ. Did in fact he state to the board that he was your advocate? A. I don't recall the exact words he used at the time.

XQ. Do you want me to play back the tape?

The Court: You don't recall the exact words he used. Is that what you are telling us?

The Witness: Yes, your Honor.

XQ. If I represent to you that he stated to the board that he was your advocate, will you deny it?

Mr. Fortunato: Objection.

The Court: What is the objection?

Mr. Fortunato: If he is trying to impeach, I don't think this is proper procedure.

The Court: It is proper cross-examination. I will allow it. A. As far as I was concerned at that hearing, I remained mute.

The Court: That wasn't the question Mr. Allen asked you. Read the question.

(Last question read)

A. I don't recall exactly what he said.

The Court: You don't recall exactly what he said?

The Witness: What he said at the time.

[72] The Court: Do you recall substantially what he said?

The Witness: All I recall, your Honor, was him protesting to the entire proceedings. The exact language, terminology, that was used at the time, I don't recall.

XQ. Isn't it a fact, Mr. Palmigiano, that he spoke extensively all the way through the hearing from beginning to end? He probably said more than any other single person in the room. A. I don't know that to be a fact.

XQ. Would you deny it? A. I don't know it to be a fact.

XQ. You tell us. How much do you think — do you recall Flint saying in that room in the posture of acting on your behalf? How much? A. Well, I recall him —

The Court: You recall Flint.

A. (Continued) — giving the date; that this was an alleged disciplinary board hearing.

The Court: This was said during the hearing, wasn't it?

The Witness: Yes.

The Court: You recall what again?

The Witness: I recall him saying that this was, you know, a meeting of the disciplinary board. He named Captain Baxter as chairman, Officer Carney, Classification Officer Mitchell.

The Court: Mitchell?

[73] The Witness. Yes. I mean Siner.

The Court: Siner?

The Witness: Siner.

The Court: Mr. Flint named them as constituting the board?

The Witness: Yes, your Honor.

XQ. Then what did he say? A. I don't recall any further from there. I recall Captain Baxter reading the book, et cetera.

The Court: You recall what?

The Witness: Captain Baxter reading the alleged charge against me.

XQ. Let me refresh your recollection. Don't you recall Flint protesting very vigorously at Remillard being in the room? A. Yes, he did.

XQ. And that went on for several minutes, didn't it? A. Yes.

XQ. Till finally what happened? A. Remillard left.

XQ. At whose request? A. At Mr. Flint's.

XQ. Was he asking on his own behalf? Did he have any charges pending against him? A. No.

XQ. He was acting on whose behalf? A. He wasn't acting on my behalf.

[74] The Court: He wasn't?

The Witness: He wasn't there as my representative, so whatever Bobby Flint — or whatever actions he took at the time, he done without my approval. He was there at my request to record the proceedings, and whatever language or words that Bobby Flint used were his own.

The Court: Did you protest his making these remarks?

The Witness: I didn't say anything, your Honor. I just sat there.

XQ. You accepted the benefit of his assistance, didn't you?

Mr. Fortunato: Objection.

The Court: I will allow it.

Mr. Fortunato: Your Honor, could I — I think that is a conclusion for the Court as to the dubious benefit.

The Court: You made no objection to any remarks he made in your hearing —

The Witness: No.

The Court: — relating to yourself?

The Witness: No, your Honor.

Mr. Allen: At this time I would ask that a tape cassette be marked as Respondents' B, and I would offer it as a full exhibit.

The Court: What do you call it?

The Celrk: Tape cassette.

Mr. Fortunato: I object to it being marked as a full [75] exhibit or coming in at this time as a full exhibit.

The Court: It is certainly entitled to be marked as an exhibit for identification.

Mr. Fortunato: I meant exhibit for evidence.

Mr. Allen: Is counsel concerned about the authenticity or relevancy? I have to know how to meet the objection.

Mr. Fortunato: My objection at this time is that the best evidence that we have of the proceedings as to what went on in that room is statements by Mr. Palmigiano. A tape duly authenticated, so far as I am concerned, could be used either to refresh his recollection and possibly through another witness to contradict what he said at the hearing.

The Court: Have you seen the tape which is being offered?

Mr. Fortunato: I haven't heard it yet, your Honor.

The Court: Have you seen it?

Mr. Fortunato: I haven't even seen it.

The Court: It is a proposed exhibit.

Mr. Fortunato: It is apparently a cassette that fits into tape recording devices. It says: "Do you own thing! Cassette 60." And it says — there is some other writing on there that says "Palmigiano, this side."

The Court: I don't know who made the tape. There is nothing in the record to indicate what its source is.

Mr. Allen: Very well, your Honor.

[76] The Court: It may be marked B for identification subject to laying a proper foundation.

Admittedly Mr. Flint did make a tape recording of the proceedings before the board.

Mr. Fortunato: Yes, your Honor.

Mr. Allen: And counsel will not stipulate that B for identification is in fact the tape.

Mr. Fortunato: I would like to hear it before I stipulate to that. But even conceding that it is, I object to it coming in.

The Court: If we are going to get into a hassle over this, I suggest Mr. Flint be brought in under oath and testify as to who made the tape.

Mr. Allen: I contend Captain Baxter would be equally appropriate.

The Court: Captain Baxter. We aim to get at the facts, gentlemen.

(Tape cassette marked "Palmigiano, 11/13/72," marked Defendants' Exhibit B for identification)

XQ. Immediately prior to the time you informed the board you were going to stand mute, isn't it a fact that Mr. Fortunato was in the hearing room, Mr. Palmigiano? A. No.

The Witness: Would you rephrase that question? I don't have it quite clear.

[77] Mr. Allen: I will rephrase the question. Strike it.

XQ. Was Mr. Fortunato in that hearing room with you at any time? A. At any time?

XQ. Yes. A. Yes, he came in at the beginning and he was informed that he could not be present at this hearing.

XQ. And Miss Munson was in there too with you. A. Miss Munson was.

The Court: Miss Munson.

XQ. And Mr. Gonnella was in there with you. A. Yes.

XQ. And he is a lawyer. A. Yes, he was.

The Court: Mr. Gonnella?

Mr. Allen: Gonnella. G-o-n-n-e-l-l-a.

The Court: They were all in the hearing room at the outset. Is that it?

The Witness: Your Honor, they all came in at the beginning of the proceedings with Mr. Fortunato.

The Court: With you?

The Witness: Yes, your Honor.

Mr. Allen: That would be Ralph Gonnella, to whom the witness has previously adverted in his testimony, and it would be Allegra Munson of the Rhode Island Public Defender's office.

The Court: In other words, they were told they could not [78] remain in the hearing room. Is that it?

The Witness: Yes, your Honor.

Mr. Fortunato: Are you asking me, your Honor?

The Court: The witness says they were.

Mr. Allen: I have no knowledge one way or the other.

The Court: You are telling us the disciplinary board told Mr. Fortunato, Miss Munson, and Mr. Gonnella that they could not remain in the room.

The Witness: The exact words I recall at the disciplinary board was "We do not allow attorneys at these hearings."

Redirect Examination by Mr. Fortunato

Q. Mr. Palmigiano, the first time that you entered the hearing room — the first time — who accompanied you into that room? A. You did.

Q. Did anybody else? A. Robert Flint.

Q. The second time —

The Court: In other words, Mr. Fortunato, Flint, and you went in together.

The Witness: Yes, your Honor.

Q. The second time you entered the room —

The Court: How long did you stay in that room following your entry thereto?

The Witness: Approximately — no longer than two, three [79] minutes, your Honor.

The Court: Then you all came out?

The Witness: Yes, your Honor.

The Court: The three lawyers and yourself?

The Witness: No.

Mr. Fortunato: Your Honor, that is the thing. I want to find out when the other two lawyers got into that room.

The Court: I thought you all went in. Oh, the two lawyers.

Q. When did — if you recall, when did Mr. Ralph Gonnella and Miss Allegra Munson go into that room? A. The second time we entered.

The Court: The second time you entered?

The Witness: Yes, your Honor.

Q. Were they there as your attorneys at your request that day? A. No.

Q. Who was your attorney that day? A. Yourself, Mr. Fortunato.

The Court: Do you know what happened, how Miss Munson and Mr. Gonnella were in there?

The Witness: Yes, your Honor. Mr. Gonnella is a member of the NPRA board of directors, and Miss Munson is legal adviser also to the Association.

The Court: We now are at the point where — to keep the succession of events here: "Flint, Mr. Fortunato, and I [80] went in together; we were there no longer than two or three minutes. Then the next bit of testimony is "Mr. Gonnella and Miss Munson went in with us later." What "later" means, I don't know.

Mr. Fortunato: I will clear this up, your Honor.

Q. Now going back to your testimony earlier today, is it fair to say that when you and I left that room the first time —

The Court: Did Flint remain?

Q. Where did Flint go, if you know? A. Excuse me. I really don't know like where he went at that point.

The Court: Did he come out with you and Mr. Fortunato?

The Witness: I really don't recall, your Honor.

Q. Did you have a conversation with anybody outside in the hall? A. Yes, I did.

Q. With me? A. With you.

Q. That is the conversation you earlier testified to that Deputy Warden Remillard came up and talked about standing mute and it being held against you. A. Yes.

Q. After remaining in the hall — how long did we remain in the hall at that time? A. No more than five minutes.

Q. Then did we go back in the hearing room? A. Then we went back in the hearing room.

Q. That is the time you said also in that room — whether they [81] walked in in front of us, behind us — nonetheless, Miss Munson and Mr. Gonnella were there. A. Yes.

The Court: You don't know whether they went in ahead of you or after you?

Mr. Fortunato: They were there.

The Court: They must have been there ahead of you if they were there when you went in.

The Witness: To the best of my recollection, your Honor, I believe they walked in behind us.

Q. Then after remaining in the room — how long on that particular trip did we remain in the room? A. Well, I believe at that time that you made some remarks pertaining to the disciplinary board, and we asked — you asked that if you could have another few minutes with me in the corridor. I don't think we was in the room over a couple of minutes.

Q. And we then exited from the room. A. Yes.

Q. When I say, "we," that is you and I. And did Mr. Gonnella and Miss Munson also leave the room? A. Yes.

Q. Then did you have another occasion to go back inside that room? A. Yes, I did.

Q. And that was to go back to the hearing. [82] A. That was to go back to the hearing.

Q. At that time neither I, nor Miss Munson, nor Mr. Gonnella went back in with you. A. Correct.

Q. Mr. Flint was in there, however, with his tape recording device. A. Yes.

Q. That is when you had the conversation with Captain Baxter. I say, "conversation." He read the charges to you. A. Yes.

Q. You said you chose to remain silent. A. Yes.

Q. At any time while you were in this hearing room did Mr. Flint give you legal advice or strategic advice as to how to present your case or what to do? A. No.

Q. Now Mr. Flint was in there at your request to operate a tape recording device. A. Yes.

Q. Did you observe him doing this? A. Yes.

Q. And would you observe him talking into it himself from time to time to explain the persons present or the trouble he might have been having with the tape recorder — things of that nature? A. Yes.

Q. After the charges were read to you, you were having your [83] conversation with Mr. Baxter regarding the charges, and you said you were going to be silent and then you were told to leave the room. A. Yes.

Q. Did Mr. Baxter at any time ask you if you wanted to have anybody there to speak in your behalf as a witness or anything of that nature? A. No.

Q. What section of the prison is the Behavior Correctional Unit in? A. It is the far south, I believe.

The Court: It is what?

The Witness: Far north. It is the last block, last wing in that building.

Q. That is your best information? A. Yes.

Q. Anyway, it is not in the general population area? A. No.

Q. And it is not in the South State Wing where you previously had your cell? A. No.

Q. Now you recall when Mr. Allen was asking you questions about the time between November 11th and the hearing? You recall that? A. Yes.

Q. Between November 11th and the hearing —

[84] The Court: November 11th and November 13th.

Mr. Fortunato: No, between November 11th, your Honor, to the date of the charge that was made and the hearing on November 13th.

The Court: That is what I say: between November 11th and November 13th.

Mr. Fortunato: Right.

Q. Between November 11th and the 13th you were kept generally locked in your cell in South State Wing? A. Yes.

Q. At the prison during the day, prior to people being locked into their cells at night, can prisoners in the general population walk around and go around near other people's cells and that type of thing? A. Yes.

Q. It was under those rules and practices that other inmates could come to your cell? A. Yes.

Q. But you were locked in your cell during the daytime hours? A. Yes.

Q. Unless an attorney or somebody else—I think you mentioned Mr. Schwartz—came to visit. A. Yes.

Q. But now since November 14th you are in the correctional unit? A. Yes.

[85] Q. That is also known as the hole. A. Yes.

Q. Or punitive segregation. A. Yes.

Q. Do other prisoners walk around back there? A. No.

Q. So no other prisoners can come to see you in your cell back there? A. No.

Q. What visitors are you allowed to see back there? A. The only visitors I am allowed to see is attorneys.

Q. Where do you take your meals? A. In my cell.

Q. When you were in the general population before the 11th, before this charge even was brought, where did you take your meals? A. In the mess hall.

Q. And other people would be present there? A. Other inmates, yes.

Q. Other inmates. During the course of the day, while you were in the general population, you had prison duties to perform? A. Yes.

Q. This is before November 11th. A. Well, I was basically working full time on—with NPRA.

Q. Was that with the warden's permission?

The Court: You were working full time for the National Prison Reform Association?

[86] The Witness: Yes, your Honor.

The Court: You weren't doing any other kind of work?

The Witness: I was still cutting hair in between.

The Court: That was very seldom. Is that it?

The Witness: Probably once a day, your Honor.

The Court: Once a day.

Q. You still had your barber shop, but you were mostly with the NPRA? A. Yes.

The Court: You mean maybe you cut one person's hair a day?

The Witness: Yes, your Honor.

Q. Does the NPRA have an office at the prison? A. Yes.

Q. Would you work in that office? A. Yes.

Q. And if you wanted to discuss prison reform matters with another inmate, he could either come up there or you might see him in the mess hall or some other arrangement could be made to see him? A. Yes.

Q. Because neither of you would be confined to the cells during the day. A. No, various inmates—

The Court: You weren't confined during the day if you were working for the—

[87] The Witness: No.

Q. Neither were other inmates in the general population? A. No.

Q. Now in your capacity—

Mr. Fortunato: Strike that.

Q. The National Prison Reform Association has brought some legal actions in this court, United States District Court, has it not? A. Yes, it has.

Q. Prior to that you have also sought relief in the Federal Court. Is that true? A. Yes.

Q. And some of these cases have gone to full written decisions by this court. A. Yes.

The Court: Not by this particular Judge.

Mr. Fortunato: Perhaps not by this Judge, your Honor, but by Judge Pettine.

Q. You have had several decisions from Judge Pettine? A. Yes.

Q. Is this one of the policies of the National Prison Reform Association: To ask to redress grievances by coming into the Federal Court?

Mr. Allen: I object.

The Court: Objection sustained.

Q. Now regarding the so-called rules that were promulgated under the [88] Morris Case—*Morris* v. *Travisono*—

The Court: Those are the regulations governing disciplinary classification procedures, et cetera?

Mr. Fortunato: I think that is Defendants' A for identification.

Q. (Continued) Did you tell any state attorneys involved in that case that you were dissatisfied with the rules that were to be submitted? A. Yes, we did. We—

The Court: "We." You were asked if you did.

The Witness: Myself; yes, I did.

A. (Continued) I requested that when negotiations was to take place, that I would be present before any negotiations would take place. And the attorneys said they would. And from my understanding, that the administration did not want us present.

The Court: Your understanding is what?

The Witness: That the administration at that time did not want us present.

The Court: That part of the answer is clearly hearsay. It may be stricken.

Q. Have you at any time told anybody that you waived any and all rights you might have to an attorney at any and all disciplinary hearings that might ever come up at the Adult Correctional Institutions? A. No.

[89] Q. Now you say that a charge was read to you.

The Court: This charge was read to him when?

Q. You said you had a charge read to you by Captain Baxter on that occasion when you entered the disciplinary hearing unaccompanied by anybody, and certainly not accompanied by any attorney. You said that is when the charge was read to you. A. Yes.

The Court: You went in with Flint, didn't you?

The Witness: Yes, your Honor.

The Court: It was read to you as you were accompanied by Mr. Flint?

The Witness: Yes.

Q. Now I am reading from the Plaintiff's Exhibit No. 1, full exhibit, in which it in effect says that you are charged —now I am quoting from the document:—

The Court: What does it say?

Q. (Continued) It says:

> "Inciting a disturbance and disrupt of ACI operations, which might have resulted in a riot. At 8:50 P.M., and from then until about 9:05 P.M., I saw, and heard inmate Palmigiano going among the other

inmates and telling them not to go to the cells, when the buzzer sounds at 9:00 P.M.''

Was that what was read to you? A. Yes.

[90] Q. That statement that I just read? A. Yes.

Q. Was anything else read to you? A. Yes.

Q. Was anything that Captain Brule had filled out read to you? A. Yes.

Q. So far as you were told? A. Yes.

Q. And do you recall the substance of what was read to you and purported to be a report by Captain Brule? A. Well, not verbatim but—

The Court: What is that?

The Witness: Not verbatim, your Honor.

The Court: Is there such a document in existence? The best evidence of the contents would be the document itself.

Mr. Allen: It is before the Court as part of Exhibit 1.

Mr. Fortunato: That didn't go in. That was separated.

Mr. Allen: It was not my intention that it be separated.

Mr. Fortunato: This is signed by Brule. The other sheet was signed by Gorton.

Mr. Allen: When I produced that and agreed to it going in as a full exhibit, I was talking about an entire document, not just—

Mr. Fortunato: I am not sure they are all part of one document.

[91] Mr. Allen: I move to strike it.

The Court: You move to strike what?

Mr. Allen: Petitioner's Exhibit 1.

Mr. Fortunato: It seems to me the time to have noted your objection was earlier in the case.

Mr. Allen: They were stapled together. When I produced them, they were stapled together. This is the first time in this proceeding I have known somebody has torn one page from a four-page document offered.

The Court: Frankly, I don't recall what happened this morning. The document was offered to the Clerk and marked as a plaintiff's exhibit, was it not, Mr. Clerk?

The Clerk: Yes, one sheet.

Mr. Allen: Counsel tore it off without my knowledge. I did not observe any tearing apart.

Mr. Fortunato: There is no problem that—

Mr. Allen: Your Honor will observe that was all stapled together when I produced it this morning.

Mr. Fortunato: There is no question about that: That I took the top page off the stapled bit and I asked Mr. Gorton if he could identify this, et cetera. These other documents are signed by other people.

Mr. Allen: I didn't observe counsel selecting out a portion of the document for his—

The Court: Am I to understand that is the complete record [92] of what transpired before this disciplinary board?

Mr. Allen: Yes, that is the complete record except for this tape.

The Court: I don't know why it shouldn't be one exhibit.

Mr. Allen: That is the way I stated it to the Court. My brother agreed to it, and he asked it be marked as Exhibit 1, and then somehow it got separated. I ask it either be rejoined or—

Mr. Fortunato: Your Honor, this is not exactly my recollection of what happened.

Mr. Allen: I entered into an agreement the whole thing go in or not.

Mr. Fortunato: If I may have the Court's indulgence for two or three minutes to review it. I may not have any objection to it all coming in.

The Court: Go ahead and read it. It seems to me it is completely irrelevant whether it comes in as one exhibit or two or three.

Mr. Allen: My only point in the matter, your Honor, was that I thought to save myself some trouble to get all these documents in without calling a flock of witnesses to verify them. I have no particular enthusiasm for making a career out of this hearing.

(A pause)

Mr. Fortunato: Your Honor, I have no objection to this [93] coming in as a full exhibit, recognizing the Court's ability to separate the wheat from the chaff. But I do want to make it very clear that at no time was I clearly led to understand that this should come in as a full document at this time—this morning. What I did is: I had Mr. Gorton on the stand, and he authenticated what he knew about it. The next pages on this are purported to be signed by one Ronald Brule who is under subpoena. And it seems to me it would then have been proper—and I still want him here under subpoena—to put the documents in through him. That is my understanding of the way to proceed if in fact the witness is available.

There is another document which purports to be signed by one James Gould, a corrections officer, which talks about what he observed one Alfredo Pelleccia doing on the evening in question. And there is also a document attached hereto that—probably the one Mr. Gorton referred to earlier, where he wrote up a report regarding both Pelleccia and Mr. Palmigiano.

So in the interest of expediency I have no objection to these becoming part of Plaintiff's Exhibit No. 1, if that is the way the Court—and if counsel is straightened out now.

The Court: The Court has no specific opinion in regard to the matter. I will expect if they are made one exhibit, they will be properly authenticated during the testimony in this case; that is all.

[94] Mr. Fortunato: Yes, your Honor.

The Court: Are all the documents, which were or should be a part of Exhibit 1, incorporated in Exhibit 1?

The Clerk: Exhibit 1 will now consist of six sheets. Six sheets will be Exhibit 1.

The Court: That was your objective, Mr. Allen?

Mr. Allen: Yes, your Honor.

The Court: Is that what you wish?

Mr. Allen: That is what I wish, your Honor.

The Court: Very well; Exhibit 1, consisting of six sheets.

(Copies of additional reports in re Inmate Disciplinary Report of Nicholas Palmigiano added to Plaintiff's Exhibit No. 1)

Q. When you went back into the hearing room alone, Captain Baxter read you a charge. That was the one prepared by Gorton that I just read. A. Yes.

Q. Did he read you a document, or did he say something to you and then make an assertion that this was something furnished him by Ronald Brule? A. No, he read it in its entirety, the report by Mr. Gorton and the attached report by Mr. Brule.

Q. Had you ever seen the report by Brule before? A. Yes.

Q. At any time? [95] A. Yes.

The Court: When did you see it, on that date?

The Witness: On that day, your Honor.

The Court: In other words, you were permitted by Captain Baxter to examine it. Is that what you are telling me?

The Witness: Yes. Well no. Captain Baxter didn't make me examine it. This is in Robert Flint's possession.

The Court: Who gave it to Flint?

The Witness: One of the superior officers.

Q. So that before the hearing you did see the second page of Plaintiff's Exhibit No. 1? A. Yes.

The Court: It was in the possession of Flint.

Q. When you saw it, it was in the possession of Flint? A. Yes.

Q. And then was this read exactly to you at the hearing —the second page was? A. Yes.

Q. And then also the portion of the first page above Mr. Gorton's signature was read to you at the hearing by Captain Baxter? A. Yes, it was.

Q. But the—and you had seen both—neither of these two pages, as such, was given to you at the hearing. A. No.

Q. But you had seen them prior to that when Mr. Flint had them in [96] his possession. A. These—

Q. (Continued) I am talking about these two. (indicating) A. Yes, I did.

The Court: When did Flint actually show you the report of Captain Brule, in the hearing room before the disciplinary board?

The Witness: I think the first time I seen them was on Sunday when the attorneys came up.

The Court: You saw it the second time in the hearing room?

The Witness: I seen it—yes.

The Court: And you read it on both occasions?

The Witness: It was read to me on both occasions.

Q. Was it given to you to read while you were in the hearing room on November 13th? A. No.

The Court: Who read it to you?

The Witness: Captain Baxter.

The Court: A moment ago you said you read the statement of Brule and that it was in the possession of Flint.

The Witness: Before the hearing it was in the possession of Robert Flint.

The Court: Before the hearing.

The Witness: That is when I seen it. A copy of this [97] report was given to him.

The Court: The original was—

The Witness: The original was kept in the superior officer's. And when I went before the board, it was read to me.

Q. Looking at the third and fourth pages of Plaintiff's Exhibit No. 1 have you ever seen this document before? A. No.

Q. Never before? A. No.

The Court: Two pages constitute one document. Is that it?

Mr. Fortunato: Yes. The third and fourth pages are headed by the words, "State of Rhode Island, Inter-Departmental Communication," and there are some initials on there; and, also, the first name that appears beneath that is Roland Remillard, Deputy Warden; and below that, words that say "Maximum Security"; and below that, the words, "Capt. Ronald Brule"; and then some other words, and then the narrative. And then it is signed—what appears to be a signature of Ronald Brule. And the Court may wish this be re-Xeroxed because the second page is a little unclear.

Q. The fifth page is a document signed with the name on it, James R. Gould, and a signature purporting to be James Gould's. And have you ever seen this document before? A. No.

Q. And then the next document purports to be signed by Luther Gorton [98] and talks about also an inmate, James Madden, who appeared to him to be sick. Have you ever seen that document before? A. No.

Q. And was this last document read to you at the hearing? A. This one here? (indicating)

Q. Yes. A. No.

Q. So the only documents that were read to you at the hearing are the first page of Plaintiff's Exhibit No. 1 and also the second page. A. Yes.

Q. And nothing else was read to you? A. No.

Q. And, as you testified earlier, no documents whatsoever connected with this case were ever given to you by a correctional officer. A. No.

Q. Whether it is a charge or finding of fact or reasons for their decision. A. No.

Q. No documents—

The Court: No documents were ever given to you?

The Witness: No, your Honor.

The Court: Did you ever receive copies from someone besides the board?

The Witness: No. I only seen a copy that was given to [99] Robert Flint.

The Court: Flint?

The Witness: Yes.

The Court: Flint in turn turned it over to you and let you look at it. Is that it?

The Witness: Yes, your Honor.

Q. And the only two copies you have ever seen through Flint are pages 1 and 2 of the Exhibit No. 1. Right? A. Yes.

The Court: Did you see a copy of the charge or charges before the hearing?

The Witness: No, your Honor.

Mr. Fortunato: Did you understand Judge Day's question?

The Witness: Did I see a copy—

Mr. Fortunato: —of the charges before going into the hearing room?

The Witness: Yes.

Q. That is what Flint had in his possession? A. That is what Flint had in his possession.

The Court: Flint had it.

Q. That is, all you ever got from Flint is a copy of the charge and a copy of Brule's two-paragraph—or whatever it is—statement that constitutes page 2 of Exhibit No. 1. A. Yes.

Q. Are you still connected with the prison Jaycees? [100] A. Yes.

Q. What is your capacity with them? A. President.

Q. You are still president of the prison Jaycees. Have you ever received any awards for your capacity as president of the prison Jaycees?

Mr. Allen: Object.

The Court: I don't see the materiality, frankly.

Mr. Fortunato: I have nothing further, your Honor.

Recross-examination by Mr. Allen

XQ. Mr. Palmigiano, let's go through it one more time. Somebody, as far as you know, gave a copy of a charge, the book, to Flint. Right? A. Right.

XQ. And Flint showed it to you on Sunday before the board. A. Right.

XQ. And he discussed it with you.

The Court: Before the board? The board meeting was Monday.

Mr. Allen: The Sunday before.

The Court: The day before.

Mr. Allen: The day before.

The Court: A copy was given to Flint and shown to the [101] witness on November 12th.

XQ. Did he discuss it with you? A. No.

XQ. Did you discuss it with Mr. Fortunato or Miss Munson?

Mr. Fortunato: Objection.

The Court: He may answer.

Mr. Allen: It calls only for a yes-or-no answer, your Honor.

A. I discussed it with Mr. Fortunato on Monday.

XQ. And Flint appeared at the hearing? A. Yes.

XQ. Flint appeared at the hearing through a system

which you, as president of the NPRA, had worked out. A. He appeared at the hearing to record it.

The Court: What is that?

The Witness: He appeared at the hearing to record it, yes.

XQ. And he stated at the hearing that he was your advocate. A. I don't know that to be a fact.

The Court: You don't know it? Do you deny it?

The Witness: He was there solely to record the events that took place at the hearing. Whatever comments was made was made, you know.

The Court: Do you deny that he made the representation to the board that he was there before the board as your advocate?

The Witness: Your Honor, I don't remember exactly what he [102] said. If he made any comments, you know, I don't recall what he said at the time.

XQ. Let me come back to it again this way. The arrangement or procedure or system, which you had devised and which was followed at the ACI, was that charges were forwarded to the president or some other officer of the NPRA? Right? A. If I may—

The Court: Proposed charges, you mean, or charges when made?

Mr. Allen: Charges when made were forwarded to the NPRA.

A. If I may answer this way here to your question—

The Court: If you can, answer that first.

A. (Continued) The system we set up was that if an inmate got booked, the booking slip would come to the NPRA.

The Court: What is that?

The Witness: The booking slip would go to the NPRA.

The Court: That is the charge?

The Witness: Yes.

A. (Continued) Now there are exceptions; that when there are possible criminal charges coming out of such an incident, that myself, as president, or any other member of the NPRA, are not capable to represent an inmate that may receive a possible criminal charge. On the ordinary booking offense NPRA represents the inmate if he so wishes.

XQ. And that is why Flint was there. [103] A. No, Flint was there at my request; that I wanted the proceedings recorded.

XQ. When you worked this out, whom did you deal with, Warden Howard? When you set up this system where these booking slips would go to you, as president of the NPRA, whom did you work that out with, Warden Howard, Remillard? A. With Mr. Travisono.

XQ. With Mr. Travisono personally? A. Yes.

XQ. Was anybody else in the room when you arranged this? A. Yes, the warden and the board members of NPRA.

The Court: In other words, it was provided that whenever a booking slip was issued, a copy of it would go to the NPRA?

The Witness: Right. And we in turn would go down and see the inmate; and if he wished to have a classification officer represent him we would forward the slip to Classification. If he wished the NPRA to represent him, we would carry it from there.

Mr. Allen: You may inquire.

Mr. Fortunato: I have no further questions, your Honor. One moment, please. (A pause) I have no further questions.

The Court: Very well. You may step down.

Mr. Fortunato: Your Honor, at this time I do not have any other witnesses to present and would therefore request that the matter be continued till 10:00 a.m. tomorrow morning. As I understand it, the other people subpoenaed—

namely; Warden Howard, [104] Captain Baxter, and Captain Brule—will be required to attend pursuant to the subpoenaes.

I would also ask that the habeas corpus regarding Mr. Palmigiano in this matter be continued in effect through tomorrow so he may come in and participate and assist me in the proceedings.

The Court: He is certainly entitled to that.

Mr. Burke: Since I have not seen the subpoena, I just want to make absolutely sure on the record the three under subpoena are Howard, Baxter, and Brule.

Mr. Fortunato: Baxter, Brule, and Howard. That is right.

The Court: Baxter—

Mr. Fortunato: Howard and Brule.

The Court: Those are the only three?

Mr. Fortunato: That is correct.

The Court: Siner is not under subpoena?

Mr. Fortunato: He is not under subpoena and neither is Carney, nor is Mr. Remillard.

The Court: Very well. We will stop here, gentlemen, with the view of resuming tomorrow morning as near to 10:00 o'clock as we can. I think I will be free. I have a commitment for 9:00 but I hope to ber eady.

Mr. Allen: Before we go, could I take—

The Court: Just a moment. I want to make it clear on the record the plaintiff is to be brought back here tomorrow morning [105] shortly before 10:00 o'clock under the habeas corpus.

Mr. Fortunato: May I have five minutes with him now before he is taken back?

Mr. Allen: I would like to move at this time that Respondents' A be made a full exhibit. And I invite the Court, if the Court so desires, to listen to this tape during

the afternoon. We would leave a player with the Court if the Court wishes to listen to it.

The Court: I thought there was some little difference of opinion as to the reliability of the tape recording. I don't want to be listening to something I shouldn't listen to. If you gentlemen can or can't agree that is a true and accurate tape—

Mr. Burke: Might I make at least one suggestion? That is that Mr. Fortunato indicated he wanted to hear the tape. I think it might save time if he is allowed to listen to the tape this afternoon in the absence of the Court so when we proceed tomorrow it will not be a case of hearing the tape twice, once here, and then, if there is no objection, by the Court.

The Court: What is the purpose of playing the tape?

Mr. Burke: For the Court to hear it—eventually for the Court to hear it. But, as I understand Mr. Fortunato, he wanted to hear the tape prior to a ruling on its admissibility by the Court. And I thought there might be a conference this [106] afternoon in the absence of the Court.

The Court: I think that might save time all around.

The Clerk: A will be allowed as a full exhibit?

Mr. Fortunato: I have no objection to it.

(Defendants' Exhibit A for identification marked in evidence)

The Court: We will expect to resume as near to 10:00 o'clock tomorrow morning as we possibly can.

Mr. Allen: Thank you, your Honor. I will withdraw Exhibit B for identification for about a half an hour.

The Court: That is the tape. Return it to the Clerk when you have finished with it.

Mr. Allen: Yes.

(Adjourned at 3:00 p.m. until Wednesday, November 22, 1972, at 10:00 a.m.)

SECOND DAY

WEDNESDAY, NOVEMBER 22, 1972

10:07 A.M.

[107] The Court: Mr. Allen?

Mr. Allen: Your Honor please, I have not heard from Mr. Burke this morning but I assume we could proceed without him because he is probably involved in certain negotiations and unable to assist me in the trial of the case. I can proceed without him.

The Court: Very well.

Mr. Fortunato: Mr. Brule.

RONALD R. BRULE, Sworn

Direct Examination by Mr. Fortunato

Q. Mr. Brule, how are you employed? A. I am a correctional officer captain at the ACI.

The Court: A little louder, please?

The Witness: Correctional officer captain, ACI.

Q. You are a captain at the ACI? A. Yes, sir.

Q. This is the Adult Correctional Institutions? A. Yes, sir.

Q. On November 11th, 1972 were you employed by the ACI? A. Yes.

Q. And were you in fact on duty that day? [108] A. Yes, I was.

Q. What were the hours of your duty that day? A. 4:00 to 12:00.

The Court: 4:00 to 12:00. 4:00 p.m. till midnight?

The Witness: Right.

Q. What were your specific duties? A. Well, I am directly in charge of the 4:00 to 12:00 shift, maximum security.

The Court: I can't hear you, sir. A little louder.

The Witness: I am directly in charge of the 4:00 to 12:00 shift, maximum security.

The Court: In charge of the maximum security.

Q. Do you know a correctional officer named Luther Gorton? A. Yes, I do.

Q. Was he under your supervision that night? A. Yes, he was.

Q. Would it be fair to say that he was the guard generally in charge of South State Wing? A. Yes, he was.

The Court: In charge of the South State Wing. Is that it?

The Witness: Right.

Q. He would be behind a locked door in that wing. Is that it? A. Yes, he was. This was from where the superior officer's office is. There is a locked door.

Q. In other words, there is a locked door between where you remain [109] in your superior office and where Mr. Gorton maintains his duty post. A. Right.

Q. Did there come a time when Mr. Gorton gave you—

Mr. Fortunato: Strike that.

Q. Do you know who Nicholas Palmigiano is? A. Yes, I do.

Q. If he the gentleman seated at the counsel table, right counsel table, facing the Court? A. Yes, sir.

The Court: The answer is yes?

The Witness: Yes.

Q. Did there come a time on the evening of November 11th when Mr. Gorton submitted a report to you regarding an incident he allegedly observed involving Mr. Palmigiano? A. Yes, he did.

Q. About what time did he give you this report? A. Well, he informed me that he was going to book—

The Court: He informed you that he was going to be booked?

A. (Continued) He was going to write out the disciplinary report on Inmate Palmigiano approximately 9:30. Now he wrote it out and I probably received it around 10:00 o'clock.

Q. I show you the first page of Plaintiff's full Exhibit No. 1 and direct your attention to the typewriting on that page that appears above a signature which says: "L. Gorton." From the [110] signature up is that what he gave you? A. Yes, it is.

Q. Now you are familiar with the rules governing disciplinary procedures at the Adult Correctional Institutions? A. Yes, I am.

Q. I show you Defendants' Exhibit A—

The Court: These are the rules that were adopted in connection with the litigation entitled—

Mr. Fortunato: —*Morris* v. *Travisono*, your Honor.

The Court: And that case was decided when?

Mr. Fortunato: That is 310 F. Supp.. I think, your Honor, it was decided in 1971.

Mr. Allen: The final judgment in that case was either entered very, very recently or is still pending. The situation is this, your Honor: A hearing was held on preliminary injunction before Judge Pettine. And the opinion, to which my brother adverts in the Federal Supplement Reports, is Judge Pettine's opinion on preliminary injunction. Thereafter—

Mr. Fortunato: These rules were filed in September of this year, if that is what you are getting to.

Mr. Allen: Yes, they were filed with this court in September of this year.

The Court: Filed in September 1972?

Mr. Allen: Yes, your Honor. There was a first draft under which the parties operated for about a year. This is the [111] so-called final draft, which was filed in September of '72, and the District Court required that the State adopt these rules under Chapter 42-35—

The Court: Chapter 42-35?

Mr. Allen: —of the General Laws.

The Court: Chapter 42, Section 35.

Mr. Allen: No; Title 42, Chapter 35.

The Court: I see.

Mr. Allen: 42, Chapter 35, entitled "The Rhode Island Administrative Procedures Act," and that act requires certain—when an agency of the State is adopting rules, it requires, in and of itself,—the act requires certain notice to be given, opportunity for hearing to be had, and a reconciliation of the notice and the hearing be drawn up by the chief of the agency—in this case the Director of Corrections—which has been done. All these things have been done. And then the rules are filed. The final step is to file the rules with the Secretary of State, which has been done.

And this was all done pursuant to an order of the District Court that we follow the state law in adopting these rules. This has taken some weeks to go through these procedures in adoption of rules, which are not unlike the procedures followed by the United States under 5 U.S. Code.

These rules have now finally been adopted, and it was the purpose of the District Court Chief Judge to enter a [112] judgment of dismissal in *Morris* v. *Travisono* because these rules have become effective state law by virtue of Title 42, Chapter 35. By their adoption under Title 42, Chapter 35 they would then have the force of state law, and the Morris case would be dismissed.

I don't know whether an order of dismissal has been filed by the Chief Judge or not, but all steps leading up to it have been accomplished.

Does your Honor follow me?

The Court: I think I do. But when do you say these rules became effective? Is there anything in the record to indicate when they took effect?

Mr. Allen: I would need Mr. Burke for that, your Honor. He was in charge of carrying out those duties. I think they were filed with the Secretary of State in the order of one month ago, perhaps the third week in October. In any event they were effective on all dates germane to this proceeding, and prior to their filing with the Secretary of State they had the force of law by virtue of the District Court's opinion and judgment by the District Court who wished these rules to have the force of state law rather than the force of federal law—if your Honor follows me.

The Court: I do.

Mr. Allen: The District Court Chief Judge ordered these to be adopted as state law under our Administrative Procedures [113] Act. Once these rules have been adopted following state procedures they have, by virtue of this General Assembly's delegation,—once adopted properly, they have the force of state law as if they were general laws of this state.

The Chief Judge, as I understand it, conceived state management of this case; that once they had the force of state law, there was no further need for the Federal Court to enforce state law; and that the Federal Court—the District Court would then enter a judgment of dismissal, disposing of *Morris* v. *Travisono*.

Mr. Fortunato: I am somewhat unfamiliar with the various proceedings, negotiations, and whatnot, that took place regarding the rules themselves. I am advised by the Clerk's office, however, that in fact these rules were filed pursuant to *Morris* v. *Travisono* in September of this year; *Morris* v. *Travisono* being the same case at 310 F. Supp. that I referred to earlier.

I don't know what the purpose of the Chief Judge is and I don't know how he or counsel involved in any case in this court can in fact serve as legislators of state law.

I think this Court can rule as to what does or what does not comport with federal constitutional standards, and perhaps they can help the Court—sometimes can help in difficult cases for the State and people who have grievances to come up with decent and fair procedures. But I [114] don't know if fiat by this court can pass state law, if I understood Mr. Allen's argument.

The Court: It sounds a little unusual, I confess. But does the State concede that these rules became effective in October of 1972?

Mr. Allen: Yes, your Honor.

The Court: No specific date but just—

Mr. Allen: I can't give you the date. If Mr. Burke were here, he could because he in fact carried through the steps.

The Court: You anticipate he will be here sometime during the day?

Mr. Allen: I anticipate he will.

The Court: Very well. We will proceed on the assumption the rules were certainly in effect prior to November 11th.

Mr. Allen: I think counsel can so stipulate.

Mr. Fortunato: That is my understanding at this time, your Honor.

The Court: Very well. I don't think we need concern ourselves any longer with that.

Q. You identify Defendants' Exhibit A as being the regulations, as far as you are concerned, which are now in effect and were in effect as of November 11th at the ACI regarding disciplinary procedures? A. Yes, I do.

Q. Directing your attention to page 16—

[115] The Court: Page 16?

Mr. Fortunato: Yes.

Q. (Continued)—of Defendants' Exhibit A and then to II of Defendants' Exhibit A and then to II—

The Court: Just a minute. 16, II: "Investigation by a Superior Officer"?

Mr. Fortunato: Yes, your Honor.

Q. (Continued) And sections C and D thereunder, is it fair to say that these two parts of the regulations require you to investigate a disciplinary infraction that is called to your attention by one of the men working under you? A. Yes, it is.

The Court: C and D—

Mr. Fortunato: C and D, yes.

The Court: —require investigation by the witness. Right?

Mr. Fortunato: Yes.

Q. And you are to make an investigation, to talk to the officer who tells you about the infraction. You are to talk to him under these rules. A. Yes.

Q. And talk to the inmate involved who is accused of the infraction? A. Yes.

Q. And you are also to check with any other employees or inmates—to use the word here—"indicated"? [116] A. Yes.

Q. And then you are to make a written summary of your investigation? A. Yes, I am.

Q. And submit this report to the deputy warden. A. Yes.

Q. And then you are to give a copy of the disciplinary report—it says:

> "A copy of the disciplinary report filed by the superior officer should be given to the inmate prior to any disciplinary hearing . . ."

Now are you to give that to the inmate or is somebody else supposed to do that, if you know?

Mr. Allen: Objection.

The Court: What is the objection?

Mr. Allen: This point is estopped because this plaintiff has admitted on the stand he negotiated with the witness

here under subpoena a different procedure, which this witness in fact has testified was followed.

The Court: What do you mean by that?

Mr. Allen: Your Honor please,—

The Court: These rules were adopted and became effective prior to November 11th, 1972.

Mr. Allen: Yes, your Honor. If Inmate Smith were to come before this Court and say the rules were not followed; I was not given a copy of the charge, then an issue would be raised. [147] I will not concede that that issue rises to the dignity of a civil rights infraction. But that is a matter of argument at some other time in some other case.

This plaintiff—this plaintiff here has told this Court that he negotiated—has told this Court yesterday afternoon, after extensive cross-examination, that he made an agreement with Mr. Travisono.

The Court: A little slower. Made an agreement with Travisono?

Mr. Allen: And with the warden.

The Court: Warden Howard?

Mr. Allen: And I will make an offer of proof the warden will so testify that he negotiated a different procedure other than that called for by the rules. Rather than a copy of the charge being given to the inmate charged, the copy, by virtue of the agreement negotiated by this plaintiff, was to be given to the plaintiff or Mr. Flint—one of these two people. In other words, there was a negotiated deviation from the rules. And this plaintiff cannot now be heard to complain because that deviation was followed in his own disciplinary case.

Mr. Fortunato: Your Honor, I don't think we have gotten into any complaint of not complying with nuances of the rules on this. I am simply asking this witness what he does or doesn't do so we can have some background. [118] The Court: You mean the customary practice?

Mr. Fortunato: Yes, I am asking him the customary practice and what he did here.

Q. It says:

> "A copy of the disciplinary report filed by the superior officer should be given to the inmate prior to any disciplinary hearing . . ."

We are referring to the disciplinary report that you make out. A. Yes.

Q. Now do you give that to the inmate or does somebody else give that to the inmate? A. Someone else gives it to the inmate.

Q. Who gives it to the inmate? A. In this case Inmate Robert Flint was supposed to give this copy to the inmate.

Q. Whom did you give your copy to? A. Captain Miller.

The Court: Excuse me a minute. He has testified Inmate Robert Flint was to give a copy of the disciplinary complaint.

Mr. Fortunato: Yes; to Mr. Palmigiano.

The Court: That was a departure from this rule, wasn't it?

The Witness: This was the order we had received that had supposedly been negotiated.

[119] The Court: This was what?

The Witness: This was an order we received from the warden and Mr. Travisono that the rules here were to be changed slightly.

Q. Who gave you the order? Did it come in the form of a written order? A. Yes.

Mr. Allen: I renew my objection, your Honor.

The Court: If there was a waiver of the technical procedures required in the rules, I think it is binding both upon the plaintiff and upon the defendants. Why isn't it? If the plaintiff chose to waive that requirement in the rules and Mr. Travisono and Mr. Howard consented to that waiver, and it would change the procedures, I think that

change of procedures is binding on all parties concerned here.

Mr. Allen: I would say no exception to the Court's logic.

Q. In this particular instance regarding Mr. Palmigiano you made out a disciplinary report pursuant to those sections that I have just referred to on page 16. A. Yes, I did.

Q. And at what time did you make your report out? A. I can't remember the exact time. It was before midnight.

The Court: When you made it out, what did you do with it again, sir?

[120] The Witness: I stapled a copy to the inmate's copy, and I addressed it to—

The Court: What is that again? You stapled—

The Witness: I made out three copies.

The Court: Three copies of your report?

The Witness: Right. One copy was to the deputy warden; two copies—one—two copies went to the deputy warden, until after the disciplinary board. The third copy I addressed to Inmate Nicholas Palmigiano and I gave it to Captain Miller who in turn hand-passed it to Inmate Flint.

The Court: You say you addressed it to Palmigiano and gave it to Captain Miller?

The Witness: Captain Miller; right.

The Court: That was your end of it?

The Witness: Yes, it was.

The Court: What was done with the report after that is purely hearsay insofar as you are concerned. Is that it?

The Witness: Yes, it is.

Q. Now I show you the second page of Plaintiff's full Exhibit No. 1. Is this the report that you made out? A. Yes, it is.

Q. And this is the disciplinary report? A. Yes, this is my investigation.

Q. This is the result of your investigation? A. Right. [121] Q. And I show you pages 3 and 4 of Plaintiff's Exhibit No. 1 and ask you if this is a letter or document prepared by you at sometime. A. Yes, it is.

Q. Without going into the details, what generally is this letter that you say you prepared, pages 3 and 4? A. This is a report of the incident that happened this night.

The Court: It is a report—

The Witness: It is a report to the deputy warden of the incident that happened November 11th.

The Court: —to to the deputy warden of the incident of November 11th. Is that it?

The Witness: Yes.

Q. Did you make a copy of that for Mr. Palmigiano? A. No, I did not.

Q. So the only thing you furnished Mr. Palmigiano was page 2 of the report. A. Right.

Q. And at what time did you prepare the letter that you say goes to the deputy warden, pages 3 and 4 of the exhibit? A. This was before midnight.

The Court: Beg your pardon?

The Witness: Before midnight on that night.

The Court: Same night?

The Witness: Right.

[122] The Court: That would be on November 11th before midnight. Correct?

The Witness: Yes.

Q. Now directing your attention to page 2 again, that is your full investigation report, is it? A. Yes, it is.

Q. And the last line on there—

The Court: You are referring now to page 2?

Mr. Fortunato: Page 2.

Q. (Continued) — states:

"He definitely appears to be a threat to the security and order of the Institution."

Without going into details, was that based upon what Mr. Gorton told you about the incidents of November 11th or was it based on any other information you had in your possession?

Mr. Allen: Object.

The Court: What is your objection?

Mr. Allen: It is outside the scope of the inquiry of this case.

The Court: I don't quite follow you.

Mr. Allen: This complaint challenges the procedural due process afforded the plaintiff at the hearing. It does not challenge the procedural due process of the investigation. There is no Fourth Amendment claim here. There is no search and seizure problem. I fail to see why we have to get off the [123] track into the background of the investigation of the alleged misconduct of the plaintiff.

Mr. Fortunato: The question before this Court, and one raised in the complaint, is the question of merely having charges read to a man and then having him found guilty, no evidence being produced.

I want to authenticate these documents and I will offer now to tie this line of questioning in with other witnesses.

The Court: Certainly the rules that were approved by Chief Judge Pettine, with apparently the consent of counsel, specified certain procedures with respect to disciplinary situations. I think reasonable latitude should be permitted to determine whether or not there has been a substantial compliance with those procedures.

Mr. Fortunato: May I have the question read, please?

(Last question read)

A. This is based on what Mr. Gorton informed me of and my personal knowledge of the situation.

Q. Of the situation of November— A. November 11th.

The Court: Based on Gorton's report and what?

The Witness: My own knowledge of the incident of that evening.

The Court: Your own knowledge?

The Witness: Yes.

[124] Q. Now in preparing the—

Mr. Fortunato: Strike that.

Q. You prepared your investigation report—page 2, in other words—after Gorton tells you that he is going to charge Palmigiano according to what he set out in his report on page 1? A. I made my report after I talked to Inmate Palmigiano.

Q. Yes, but you began your investigation of the incident after Gorton reported to you. Is that correct? A. Yes.

Q. Had Gorton given his charging sheet to you at that time when you started your investigation? A. Yes, he did.

Q. So you had seen page 1 before you began your investigation. A. Yes, I had.

Mr. Fortunato: Page 1 of Plaintiff's Exhibit 1.

The Court: In other words, after you received Gorton's report you began your investigation, including an interview or discussion with the plaintiff. Is that it?

The Witness: Yes, sir.

Q. In preparing your investigation report you talked at some point to Mr. Palmigiano? A. Yes, I did.

Q. You had also talked to Mr. Gorton? A. Yes.

Q. Did you talk to anybody else? [125] A. Not concerning Mr. Palmigiano.

The Court: What is that, please?

The Witness: Not concerning Palmigiano.

Q. In other words, your disciplinary report—page 2 again—investigation report, is based solely on your contact with Mr. Gorton and Mr. Palmigiano. A. And my personal knowledge of the incident that evening.

The Court: And your personal knowledge of the incident?

The Witness: Yes.

Q. And for the purposes of your investigation report then that copy, that you prepared and gave to Mr. Palmigiano, and the other two copies going to the deputy warden—this constitutes a full statement of the significant facts that you had in your possession. A. Yes.

Q. Now at what time did you see Mr. Palmigiano? A. I don't remember exactly. It was around 11:00. 11:00 o'clock, I would imagine.

The Court: Around 11:00?

The Witness: Around 11:00. I don't know exactly what time it was.

Q. This, of course, was in the course of your investigation. A. Yes.

Q. And where was Mr. Palmigiano at this time? A. He was in his cell.

[126] Q. Locked in? A. Yes.

Q. Did you read the charge to him? A. Yes, I did.

Q. Did you have any further conversation with him at that time? A. I asked him what he had to say on the matter.

Q. As a result of that conversation, that you say you had, you prepared your investigation report? A. Yes; right.

Mr. Fortunato: Page 2 of the exhibit.

Q. Now directing your attention to November 13th, 1972, did you appear at any disciplinary hearing at which the charges were pressed against Mr. Palmigiano? A. No, I did not.

Q. Have you appeared at any disciplinary hearing at which the charges were pressed against Mr. Palmigiano? A. No.

Q. And you say that this letter, that constitutes pages 3 and 4 of Plaintiff's Exhibit No. 1, was given to Deputy Warden Remillard? A. Yes, it was.

Q. Did you give it to him personally? A. I sent it in the mail.

The Court: What is that, please?

The Witness: I addressed it to him and left it in the central office for him to pick up the next day.

[127] Q. That is the inter-prison mail? A. Yes.

Q. What is that called, that report? A. What is it called?

Q. Yes. A. What do you mean by that?

Q. Well, we called the other one—we have been calling the other report, that you prepared and gave to Mr. Palmigiano, your investigation report or your disciplinary report. What is this document called?

The Court: It doesn't bear any title?

The Witness: No.

A. It is a report to the deputy warden on the incident that happened that evening.

The Court: It is a report apparently. I don't know what else we could term it, regardless of any title.

Q. Well, the rules provide, do they not, at II D on page 16 that a copy of the disciplinary report, filed by the superior officer, should be given to the inmate prior to any hearing? So we are agreed that page 2 is called a disciplinary report, are we not? Can we agree on that? A. No, page 1 was the disciplinary report.

Q. Page 1 is the disciplinary report? A. Yes. According to Pettine's rules, page 2 is not supposed to go to the inmate.

[128] The Court: What is that, please?

The Witness: According to the rules put in this document, page 2 is not to the inmate.

Q. What you are now saying is that page 1 of the full exhibit is the disciplinary report. A. This is what is supposed to go to the inmate, just this top half.

Q. Which merely tells him what he is accused of? A. Yes.

The Court: What is the practice: To delete the remainder of that page 1, as it appears on the exhibit?

The Witness: In this case both pages went to the inmate.

The Court: Page 1 and what?

The Witness: And page 2.

The Court: Both went?

Mr. Fortunato: Yes.

The Witness: In the document the top and bottom half go to the classification counselor, and he discusses it with the inmate.

Q. Let's back up a little bit. II D says:

> "The superior officer shall make a written summary of his investigation including the results of his interviews and a notation of notice to the inmate. He shall sign and submit the full report to the Deputy Warden of the facility in which the infraction occurs. A copy [129] of the disciplinary report filed by the superior officer should be given to the inmate prior to any disciplinary hearing . . ."

Did you make out page 1 that I show you here? A. No, I made out page 2.

Q. Gorton made out page 1?

The Court: One portion.

Mr. Fortunato: Yes. He made out everything above his signature.

Q. So you are saying that page 2, which starts with the words, "Superior's investigation," does not constitute a disciplinary report, as defined by II D of the regulations. A. Well, it hadn't been. It has been going to the inmates recently.

The Court: This is just a preliminary report before there has been any disciplinary action, isn't it?

The Witness: Yes, it is.

Q. When you went to Mr. Palmigiano's cell sometime around 11:00— A. Yes.

Q. (Continued)—in the evening of November 11th, it was you who told him he may be prosecuted for a violation of state law? A. Yes, I did.

The Court: You told Palmigiano that he could possibly be prosecuted for violating state law?

The Witness: Yes, I did.

[130] Q. And you had in mind incitement to riot, something of that nature? A. I didn't know what law it would be. This was not my determination. In case—it was my duty to inform him he may be prosecuted.

Q. Who had told you he might be prosecuted? A. No one had told me at the time, but seeing as how I was making the report it was my duty to inform him that he may or may not be.

The Court: He may or may not be what?

The Witness: Prosecuted.

Q. You also told him to get his lawyer because of the possibility of criminal prosecution? A. Yes, I did.

Q. Now in order to bring the disciplinary board people up to date prior to the hearing on November 13th, did you have any conversations regarding this incident with Captain Baxter? A. No, I did not. Captain Baxter was off the day after.

Q. How about Officers Siner or Carney? A. No, I did not.

Q. Did you discuss the incident with Mr. Remillard? A. Yes, I did.

Q. When did you talk to him about it? A. I talked to him that evening, the evening of the 11th.

Q. He was also on duty that evening? A. No, I called him at home.

Q. Did you charge another inmate named Alfredo Pelleccia also this [131] evening? A. Yes, I did.

The Court: Is that Pelleccia?

Mr. Fortunato: Pellecia, yes.

The Court: How do you spell it?

Mr. Fortunato: I believe it is P-a-l-e-c-i-a, your Honor.

The Court: Did he charge him with what?

Q. Did you charge him with something arising out of the same incident? A. Yes.

Q. Did you investigate that case too? A. Yes, I did.

Q. Did you also determine he was a threat to the security of the institution? A. Yes, I did.

Q. Just one or two things to clear up, Mr. Brule. The report to Deputy Remillard—

The Court: That is part of Exhibit 1, is it?

Mr. Fortunato: Yes, it is the 3rd and 4th pages, your Honor, of Exhibit 1.

The Court: Exhibit 1, pages 3 and 4.

Mr. Fortunato: Right.

The Court: That is the report.

Q. That is the report, written report, you made to Deputy Remillard? [132] A. Yes.

Q. And this is based generally on the incidents of November 11th, the evening of November 11th— A. Yes, it was.

Q. (Continued—involving a second man named Madden, this man, Pelleccia, and Mr. Palmigiano,—generally what you believe went on. A. Yes.

Q. This report was also prepared—when I say, "also," in addition to the shorter report which is entitled "Superior's Investigation," page 2, full Exhibit 1 for the plaintiff—these pages 3 and 4 were also prepared after your investigation. A. Yes.

The Court: They were prepared on the night of November 11th.

The Witness: Yes; right.

The Court: Before 11:00 o'clock. Is that right?

The Witness: Right around there.

Q. What inmates besides Pelleccia and Palmigiano would you have occasion to talk to regarding the preparation of your report? A. No one.

Q. No inmates? A. No.

Mr. Fortunato: I have nothing further of this witness at this time, your Honor.

Cross-examination by Mr. Allen

[133] XQ. Two points I want to clear up, Mr. Brule. I am going to show you the original document, of which Plaintiff's Exhibit No. 1 is a copy.

(Document submitted to Mr. Fortunato by Mr. Allen)

Mr. Fortunato: Right.

XQ. (Continued) Now you hold that in your lap and I will ask you some questions about it.

The Court: Plaintiff's Exhibit No. 1 is merely a copy of the original.

Mr. Allen: Of the original. The original is now in the witness's hands.

The Court: What was the source of the copy? Who produced that?

Mr. Allen: We did, your Honor.

The Court: You did.

XQ. (Continued) Now, Mr. Brule, you follow down the page until you come to Luther Gorton's signature. You see where I am directing your attention to? A. Yes.

XQ. All right. The next section of that page deals with what subject matter?

Mr. Allen: Strike that. Let me back off.

XQ. Does that page 1 of Exhiibt 1 break down into three separate sections to be filled out? [134] A. Yes, it does.

XQ. Who fills out the first one? Who did fill out the first section in this case? A. Mr. Gorton.

XQ. Now what is the subject matter of the second section of the first page? A. It is split up into whether the inmate was forewarned of the disciplinary action, witnesses to the infraction, and the superior officer's investigation.

XQ. Who customarily fills out that section of the page? A. Superior officer.

XQ. And in this case will you read into the record what that section says? A. It says: "Was Inmate Forewarned . . ."

Mr. Fortunato: Objection.

The Court: What is the objection?

Mr. Fortunato: I don't think there has been any foundation. There is some typewriting there.

Mr. Allen: I can only do it one at a time.

Mr. Fortunato: There is a space for signature and authentication. I don't think he is doing anything more than reading an exhibit that has been placed in.

The Court: It is for my enlightenment. I haven't read the exhibit. Go ahead.

A. (Continued) "Was Inmate Forewarned Before Disciplinary Action [135] Was Taken?"

The answer is "Yes, by Capt. Brule."

XQ. Who typed in those words: "Yes, by Capt. Brule"? A. The deputy warden's clerk.

XQ. At whose instructions? A. At my instructions.

XQ. And under your supervision? A. Yes.

XQ. What else does it say? A. "Did Other Institutional Personnel Witness The Infraction?"

The answer is "No."

XQ. Was that "No" typed in? A. Yes, it was.

XQ. By whom? A. By the deputy warden's clerk.

XQ. At whose instructions? A. At my instructions.

XQ. And under your supervision? A. Yes.

XQ. What else does it say? A. "Did Superior Officer Orally Inform Inmate of Infraction?"

It says, "Yes Capt. Brule."

The Court: "Yes Capt. Brule."

The Witness: "Yes Capt. Brule."

XQ. Is that typed in?

[136] The Court: That is yourself?

The Witness: Yes.

XQ. Is that "Yes Capt. Brule" typed in? A. Yes, it is.

XQ. By whom? A. By the deputy warden's clerk.

XQ. At whose instructions? A. At my instructions.

XQ. And under your supervision? A. Yes.

XQ. What else does it say? A. It says, "Superior Officer's Investigation: (see attached report)

XQ. What is typed in on that there? Don't turn it over yet, please. We haven't finished all the typing yet. Is some of that portion typed in? A. Yes, it says "(see attached report)."

XQ. Who typed that in? A. The deputy warden's clerk.

XQ. At whose instructions? A. My instructions.

XQ. And under your supervision? A. Yes.

XQ. And is there a signature line? A. Yes, there is.

XQ. Did you sign on that signature line? [127] A. No, I did not.

XQ. Did you sign the attached report? A. Yes, I did.

XQ. Did you affix the attached report to it? A. Yes, I did.

XQ. And is the attached report adverted to on page 1 the document which my brother has been referring to in his direct examination of you as page 2 of Exhibit 1? A. Yes.

XQ. So that in point of fact page 2 is an amplification of what you would regularly write in on the charging report. A. Yes.

XQ. And customarily under the Morris Rules the inmate or his NPRA advocate is furnished a copy of all of page 1. Isn't that correct? A. Yes.

XQ. After the superior officer has filled in the second portion. Is that correct? A. Yes.

XQ. So that when you told the Court a few minutes ago that page 2 is normally not given to the inmate, what you meant is normally there is no page 2; it is all on page 1. A. Yes.

XQ. Now my brother laid some stress on the fact that you talked to Palmigiano and Gorton and no one else. Let's go into that.

[138] What time did you come to work that night? A. Approximately 3:30 in the afternoon, p.m.

XQ. And you were still on duty at 8:00 p.m.? A. Yes, I was.

XQ. Was there some circumstance or event out of which all of these subsequent events arose? A. Yes, there was.

XQ. What was that event?

Mr. Fortunato: Objection, your Honor.

The Court: What is the objection?

Mr. Fortunato: This is the same position, I think, Mr. Allen took yesterday: That we are trying not to go into the details of the infraction and what exactly transpired.

It makes no difference as to whether it was for stopping a guest or trying to burn the place down. It makes no difference for the purposes of this hearing.

It seems to me Mr. Allen is about to begin inquiring into the subject matter of the infraction and not merely what the charging papers say or how the charging papers were prepared or came to be presented to the various people who are involved before the Court.

Mr. Allen: May I be heard your Honor?

The Court: Certainly.

Mr. Allen: All I am proposing to show through this witness at this time is that this witness was as familiar [139] with the goings-on that evening by personal contact as Gorton was.

The Court: I think you are entitled to show it. I am interested in getting at the truth here, gentlemen. I am not attempting to decide the case without the evidence. Let's have it. There is no jury here.

Mr. Allen: May we have the question read back, your Honor?

The Court: Certainly.

(Last question read)

A. At approximately 20 past 8:00 that evening—

The Court: 8:20?

The Witness: 8:20, yes.

A. (Continued)—Mr. Gorton informed me there was a sick inmate in his wing and the inmate was in his cell.

XQ. Did you go down and see that inmate? A. Yes, I did.

XQ. Did you undertake to afford medical assistance to that inmate? A. Yes, I did.

XQ. Personally, yourself? A. Yes. Well, I called the Medical Center.

XQ. Subsequent to that time did any inmate discuss the health of the sick inmate with you? A. Inmate Pelleccia at 8:30—

The Court: 8:30.

A. (Continued)—and Inmate Palmigiano at 8:45.

[140] XQ. Did you have an extended discussion with Mr. Palmigiano at 8:45? A. Yes, I did.

XQ. So that when Gorton came to you at 9:00 o'clock, you knew all about it, didn't you? A. Yes, I did.

XQ. And you were thoroughly familiar with Palmigiano's attitude? A. Yes, I was.

XQ. You testified on direct examination—

Mr. Fortunato: I ask that that be stricken so far as his being familiar with any attitudes are concerned.

The Court: I think it calls for a conclusion. It may be stricken. Go ahead.

XQ. Now when you went down and saw Palmigiano after Gorton had booked him, you said you discussed—you asked Palmigiano if he had anything to say about it? A. Yes.

XQ. What did Palmigiano say to you? A. He says that he had not incited any disturbance.

The Court: He said what?

The Witness: He said he had not incited any disturbance.

A. (Continued) And he wanted me to put down on my investigation that he had come to me earlier and I refused to give the inmate any treatment—the sick inmate—and

that the inmates had stayed out of their cells because I would not do my job.

The Court: Would you read that answer to me?

[141] (Last answer read)

The Court: You say that he asked you to put that in your report?

The Witness: Yes, he did.

The Court: What was your reply?

The Witness: I told him I would.

The Court: You told him what?

The Witness: I told him I would put it in my report.

The Court: What he had asked you to put in there?

The Witness: Yes.

XQ. Mr. Brule, are you a doctor? A. No, I am not.

XQ. Are you a registered nurse? A. No.

XQ. Are you a licensed practical nurse? A. No.

XQ. Did you receive training from the armed forces as a corpsman or a pharmacist's mate? A. No.

XQ. Are you certified by the American National Red Cross as a first aid instructor? A. No.

Mr. Fortunato: We will stipulate he is eminently unqualified to determine whether anyone is sick or not.

The Court: Or to give treatment. I think that is [142] well established, Mr. Allen.

XQ. In summation then will you tell the Court once more the personal contact that you had with Palmigiano before that evening in connection with the Madden — incident that you had with Palmigiano before Gorton told you that he had booked Palmigiano? A. At approximately 10 minutes to 9:00 that evening Mr. Palmigiano—

The Court: At about 8:50. Yes?

A. (Continued) —Palmigiano came to the door—

The Court: To what door?

The Witness: The rear hall door.

The Court: Came to the rear hall door.

XQ. That is your office? A. Yes.

(Continued) — and told me that if I did not take the Inmate Madden to the hospital immediately,—

The Court: A little slower.

A. (Continued) He told me that if I didn't take the Inmate Madden to the hospital immediately, the inmates were not going to go to their cells at 9:00 p.m.

The Court: "If I did not take Inmate Madden to the hospital immediately, the inmates were . . ." What?

The Witness: —would not go to their cells at 9:00 p.m.

The Court: This is at 10 minutes of 9:00 he told you that?

The Witness: Yes, it was.

XQ. That was the sum and substance of that conversation? [143] A. Yes.

Mr.Allen: You may inquire.

Redirect Examination by Mr. Fortunato

Q. Even though you are not trained as a doctor, Mr. Brule, you determined at some point, though, to call the Medical Center on behalf of the person that you say Mr. Palmigiano was complaining about? A. Yes, I did.

Q. What time did you call the Medical Center? A. 8:25.

Q. When was the first time you had seen Mr. Madden? This is the sick man? A. Yes.

Q. When was the first time you had seen him that evening? A. 8:20.

Q. Had any other officers out there told you he might be sick? A. No.

Q. How did you find out he was sick? A. Mr. Gorton told me the inmate was sick.

Q. He is another officer? A. Yes.

Q. He is the officer that told you he was sick? A. Yes.

Q. Now when you had your conversation with Mr. Palmigiano around [144] 8:45 p.m. or 8:50, you say that this was at the door to the rear hall. A. Yes.

Q. Now you were on one side of the door; in other words, out where your office is. Is that correct? A. Yes.

Q. And he was on the other side of the door facing into the cell block? A. Yes.

Q. In fact that is a solid door, isn't it? A. Yes, it is.

Q. And there is just a hole, a sliding panel, in the door about 6 inches x 6 inches that people look through to talk to each other? A. Yes.

Q. So when he came to the door, that panel was open; and you and he conversed through the little hole in the door. A. Yes, it was.

Q. Now had you been in the rear hall earlier that evening? A. Yes, I had.

Q. Had you been to the sick man's cell before making the call to the hospital? A. Yes.

Q. You had gone and examined—

The Court: He went to the sick man's cell at 8:20. [145] (To the witness) Is that right?

The Witness: Yes.

Q. When Gorton told you at 8:20 that the man was sick, you then went to the cell? A. Yes, I did.

Q. How long did you spend with the sick man? A. Just enough time to ask him what his problem was; probably three, four minutes.

Q. Was Mr. Palmigiano present in the sick man's cell at that time? A. No, he was not.

Q. Did you see Mr. Palmigiano at that time? A. No, I did not.

Q. So after you got through with the sick man, you then went back to your superior office? A. Yes.

Q. When was the next time you then entered the South State Wing? A. About 8:50.

Q. 8:50? A. Yes.

Q. And who had requested that you come in at that time? A. Mr. Palmigiano had told me the inmates would not go

to their cells at 9:00 o'clock unless I took this man to the hospital. I went back in again to check the inmate to see if he had gotten any worse and to explain to him what was being done in his behalf.

[146] Q. You went to the sick man's cell block? A. Yes.

Q. What tier of the cell block is that on? A. L tier.

The Court: What?

The Witness: L tier.

Q. Is that the first, second, or third floor? A. First floor.

Q. Did any other officers accompany you to the cell? A. No.

Q. You went by yourself to the cell? A. Yes, I did.

Q. And this was at 8:50? A. Yes.

Q. And what time did you leave the cell block after that? A. Right after I got through talking to the inmate; three, four minutes later.

Q. You were back at your superior office by 8:55? A. Yes.

Q. What time are the inmates normally locked inside their cells? A. 9:00 p.m.

Q. At 9:00 p.m. you were back in your office? A. Yes.

Q. And what time were the inmates in their cells on November 11th? A. Approximately 9:10 p.m.

[147] Q. 10 past 9:00? A. Yes.

Q. So you at no time in the course of this evening saw and heard Mr. Palmigiano turn to any other inmates and say, "Okay, men, don't go back into your cell."? Did you ever hear him say that to another inmate? A. No, I didn't hear him say that.

Q. Now on the first page of Plaintiff's Exhibit No. 1 there are two lines down from Mr. Gorton's signature the lines that are designed for the superior officer apparently to fill in. One of those lines says—in fact, the second line down from the signature: "Did Other Institutional Personnel Witness The Infraction?" By "Institutional Personnel" do you mean guards or inmates or both? A. Just guards.

Q. Just people employed as guards out there? A. Right.

Q. Do you have personal knowledge as to whether or not the sick man was taken to a hospital? A. Yes, he was.

Mr. Fortunato: One moment, please, your Honor.

(A pause)

Mr. Fortunato: Just one or two other questions, Mr. Brule.

Q. Mr. Palmigiano at no time assaulted you or threw anything at you or anything of that nature?

[148] The Court: There is no claim here that indicates any such incident happened, is there? What will that add to the evidence here? There is no contention by the Government that Palmigiano—

Mr. Fortunato: It was the last question, your Honor. Thank you.

The Court: I think we can do without it.

Mr. Allen: No further questions, your Honor.

The Court: Yoy may step down, Captain.

JOSEPH D. BAXTER, Sworn

Direct Examination by Mr. Fortunato

Q. How are you employed, sir? A. By the State of Rhode Island.

Q. And in what capacity? A. Correctional officer captain, ACI.

Q. And directing your attention to November 13th of this year, were you on duty that day? A. Yes, sir.

Q. What were your general functions that day? A. I was the day captain.

Q. The day captain? A. Yes, sir.

Q. A little more specifically, what would your duties include? A. Well, I have a majority of duties.

Q. Are you in charge of lower ranking officers out there?

[149] A. Yes.

Q. And if they have problems, questions, they might come to you—that type of thing? A. Yes, sir.

Q. Did there come a time during the day of November 13th when one of your duties consisted of serving on a disciplinary hearing board? A. Yes, sir.

Q. Were other officers assigned to serve on that board with you? A. Yes, sir; one other officer and a classification counselor.

The Court: What is that, please?

The Witness: One other officer, a correctional officer, and a classification counselor.

Q. What was the correctional officer's name? A. Norman Carney.

Q. What was the classification counselor's name? A. Mitchell Siner.

The Court: You say Siner?

The Witness: Siner, sir. S-i-n-e-r.

The Court: What again is—

The Witness: He is a classification counselor.

The Court: Classification counselor.

Q. Do you know who Nicholas Palmigiano is? A. Yes, sir.

Q. The gentleman that is seated at counsel table? [150] A. Yes, sir.

Q. Did there come a time on November 13th, as one of your duties as a member, along with the other two men on the disciplinary hearing board, that you were to consider an infraction against him? A. Yes, sir.

Q. Can you approximate at which time this hearing commenced? A. It was between 1:00 o'clock and 3:00 o'clock, sir.

Q. You had some other hearings that day? A. Yes, sir.

Q. When Mr. Palmigiano first entered the room, do you have any recollection as to whether or not he was accompanied by me? A. Yes, sir.

Q. Do you recall—

The Court: What is your answer? Was he?

The Witness: Yes, he was accompanied by this gentleman right here. (indicating Mr. Fortunato)

Q. Were you advised by either Mr. Palmigiano or myself that I was Mr. Palmigiano's attorney? A. Yes, sir.

Q. At that point did you advise me of anything regarding the presence of an attorney at disciplinary— A. Yes, sir. I advised you that this was not a court of law; that this was a disciplinary hearing; and that we had no attorneys attending disciplinary hearings.

[151] Q. At that time— A. (Continued) This is an institutional policy.

Q. Just to go quickly through a bit of a sequence here: At that time Mr. Palmigiano and I removed ourselves from the room. Is that correct? A. And consulted in the rear hall, yes.

The Court: Did what?

The Witness: Consulted with his attorney in the rear hall—Mr. Palmigiano.

The Court: In the rear hall?

The Witness: Yes, just outside the deputy warden's office.

Q. This is a hallway space outside? A. Outside where the disciplinary board was being held.

The Court: Is there a door between the disciplinary board and the deputy warden's office?

The Witness: Yes, sir; there is a door there.

The Court: You don't know what transpired on the other side of the door?

The Witness: No, sir; I don't.

The Court: They left?

The Witness: They left from the office.

Q. Then at some point did we re-enter? A. Yes, sir; after quite a time you re-entered.

Q. Did there come another time when we removed ourselves again together from that room? [152] A. Yes, sir.

Q. And then—

The Court: You came back and then left?

Mr. Fortunato: Yes.

The Court: How long afterwards did they leave?

The Witness: I don't know how long a time elapsed, sir. It wasn't too long.

The Court: Sometime afterwards?

The Witness: Yes, sir.

Q. And then there came a time, shortly after Mr. Palmigiano and I left, that Mr. Palmigiano came back in the room not accompanied by me or any other attorney. Is that correct? A. No, he was only accompanied by Robert Flint.

Q. He had no attorney. A. No attorney.

Q. There was no attorney there?

The Court: He came back with Robert Flint?

The Witness: Yes, sir.

The Court: Had Flint been in the room before that?

The Witness: Yes, sir; he was there over all the different things that were going on between the attorneys. And there were several people come in: Mr. Schwartz and—

The Court: They had come in before you started the hearing?

The Witness: Yes, sir.

The Court: Flint,—

[153] The Witness: Mrs. Katz, I believe, was there.

The Court: Flint, Schwartz, and who else?

The Witness: I believe Mrs.— this young lady right here. (indicating) I am not sure of her name.

The Court: Miss Munson, you mean?

The Witness: Mrs. Katz, and this gentleman, and Robert Flint, and Nicholas Palmigiano.

The Court: Mrs. Katz, Flint, Schwartz, Palmigiano.

The Witness: I can't recall anyone else, sir. I don't know for sure.

The Court: You were hearing other cases on this particular day, were you not?

The Witness: Yes, sir.

The Court: After you had completed the hearing of one or more cases, this case was called. Is that it?

The Witness: Yes, sir.

The Court: Was notification given to Mr. Flint, Palmigiano, or someone that you were ready to hear that case?

The Witness: Yes, sir.

The Court: And then they all came in.

The Witness: Yes, sir.

The Court: Together.

The Witness: Right.

Q. Is it possible that Mrs. Katz was not present but maybe somebody else was? [154] A. It is possible.

Q. Maybe Miss Munson? A. Yes. Yes, I believe—that is right, yes. I think it was; I am not too sure.

The Court: We have with us this morning Mrs. Katz or Miss Munson?

Mr. Fortunato: This is Mrs. Katz. (indicating)

The Court: Was Miss Munson here yesterday?

Mr. Fortunato: No.

The Court: I am in error then. Mrs. Katz. I am sorry. I assumed it was Miss Munson.

Q. When Mr. Palmigiano was in the room by himself after the attorney problem had been discussed—

The Court: Wait a minute here. Am I to understand they were all there for awhile; then they all left—is it the deputy warden's office? They all left the deputy warden's office?

The Witness: Yes, sir; then they come back in.

The Court: Who came back in?

The Witness: They all came back. Then they left again, and Palmigiano and Robert Flint returned.

The Court: I see. In other words, they were in there twice. They left twice.

The Witness: I believe so, sir.

The Court: And then Palmigiano and Schwartz came in. Is [155] that it? Palmigiano and who?

The Witness: Flint; Robert Flint.

The Court: Go ahead.

Mr. Fortunato: Just to try to clear this up a little bit, your Honor—

The Court: I think you had better.

Q. If I were to say to you that when the hearing commenced and you were ready to begin on the Palmigiano case, any time that the board did anything Flint was present with a tape recorder? Can we agree on that? A. Yes, sir.

Q. The first time Palmigiano entered the room he was accompanied by me. He then left the room. He came back into the room again, again accompanied by me and also Ralph Gonnella and Miss Munson.

The Court: How many times did Palmigiano leave the room and come back? I have got notes here at one time he came in with Flint, Schwartz, Mrs. Katz.

Mr. Fortunato: If I can pursue this, your Honor, I think I can focus in on it.

The Court: I think you had better.

(To the witness) This hearing started at approximately 11:00 o'clock. Was that it?

The Witness: No, sir; I believe it started in the p.m.

The Court: 1:00 o'clock?

The Witness: 1:00 o'clock; around there, sir.

[156] The Court: At the outset of the hearing who came in first? Let's get this chronologically.

Mr. Fortunato: May I interrupt the Court for just a minute, please?

Q. You started conducting hearings at 1:00 o'clock? A. Yes, sir.

Q. Did you conduct several before Palmigiano's? A. I don't know how many. Maybe several, yes.

Q. When Palmigiano was first summoned, is it fair to say that the first time that he entered, he entered with me; that then after some discussion about the presence of an attorney, Palmigiano left with me, left the room; after a short period of time Palmigiano re-entered, accompanied by me, I think so,—and would it be fair to say Miss Munson and Ralph Gonnella?

The Court: Miss Munson?

Mr. Fortunato: Yes.

The Court: Not Mrs. Katz.

The Witness: Not Mrs. Katz.

The Court: Palmigiano, Fortunato, Miss Munson.

Q. And after some discussion, at that point Palmigiano, myself, Gonnella—

The Court: Was Gonnella with you when you went in there?

Mr. Fortunato: The second time, I think he was.

Q. (Continued) —Miss Munson, all left the room. Then—

[157] The Court: This is as confusing as can be. Am I to understand when Palmigiano's case was called you and Palmigiano entered the room; there was a discussion about your right to be there and participate; you and Palmigiano left the room?

Mr. Fortunato: That is correct.

The Court: And after some time spent outside the deputy warden's office you, Palmigiano, Miss Munson,—

Mr. Fortunato: Yes.

The Court: —Gonnella and Schwartz—

Mr. Fortunato: I don't know about Schwartz.

The Witness: I think he was there.

The Court: Schwartz's name was given to us a minute ago.

The Witnss: I believe he was there. I could be mistaken but I believe he was there.

The Court: But Gonnella and Miss Munson had arrived in the meantime and went in with you on the second occasion.

Mr. Fortunato: I was as surprised as anybody else that they were there, but they were there.

The Court: Can we conclude Schwartz came in with Mr. Fortunato, Palmigiano, Miss Munson, Gonnella? Or was Schwartz already there?

The Witness: I believe he was in the area, sir, before; and the second time they came in I believe he was there. I think I saw him. I am not positive of it but I think I saw him in the area.

[158] The Court: All right.

The Witness: There was a lot of confusion at that point.

The Court: I would think so. Then there was further discussion?

Q. Then is it fair to say that Palmigiano, myself, and any other attorneys or non-prison personnel left the room at that point? A. Yes, sir.

The Court: With the exception of Flint.

Mr. Fortunato: I don't know about that.

A. Which point are you talking about? You left the room a couple of times.

Q. We have gotten to the point where somehow not only am I in there with Palmigiano, but so are Munson and Gonnella. There came a time when all those people left. Is that true? A. Yes, sir.

Q. Along with Palmigiano. A. Yes, sir.

Q. Then the next thing that happened, so far as getting the case of characters assembled, is that Palmigiano comes

back into the room without any lawyer whatsoever. Is that fair to say? A. Without any lawyer but he had Robert Flint.

Q. Robert Flint was another inmate. A. He was the prison advocate. That is what he called himself.

Q. Flint gave himself that title? A. Yes, sir.

[159] The Court: He gave himself that title?

The Witness: Yes, sir.

The Court: Had he appeared previously in similar cases as the advocate for other prisoners?

The Witness: Yes, sir.

Q. Did he usually bring a tape recorder along to record proceedings? Is that part of— A. If an inmate wants it. The tape recorder was provided that day and was only used for two cases.

The Court: Who provided it?

The Witness: I don't know. The National Prison Reform Association came up with it or I believe Mr. Schwartz or somebody brought it in.

The Court: It was first provided that day, was it?

The Witness: They had one weeks ago, your Honor, and it got broken, and we hadn't had one for a number of weeks. And then this case came up and all of a sudden we had one.

Q. Just to clear this up on the tape recording device: Are you familiar with the rules and regulations governing disciplinary procedures at the ACI? A. Yes, sir.

Q. Are you familiar with the rule contained in those regulations permitting an inmate at his request to have a tape recorder present? A. Yes, sir.

[160] Q. To assist the Court, would it be fair to say that that rule appears at the bottom of page 18? It is listed as rule No. 10 and it says that

> "Any inmate appearing before a disciplinary board may upon request have a recording made of the hear-

ing provided that the equipment for said recording must be furnished by the inmate . . .''?

The Court: What is that again?

Mr. Fortunato: I am asking the witness—

The Court: My copy isn't clear.

Mr. Allen: Your Honor please, I will furnish the witness a copy of the rules.

The Court: I say my copy isn't clear. You go ahead and read it.

Q. At the bottom of page 18 of Defendants' Exhibit A is a paragraph called paragraph 10, and it says that

> ''Any inmate appearing before a disciplinary board may upon request have a recording made of the hearing provided that the equipment for said recording must be furnished by the inmate and that said recordings are to be impounded except for purposes of administrative or judicial review.''

That is part of the rules, in other words. A. Yes, sir.

Q. And during the course of the proceedings Mr. Flint operated the [161]tape— A. Yes, sir.

Q. And when people would speak, he would shove the microphone in their direction so they could say their piece. A. Yes, sir.

The Court: We will take our customary recess at this point.

(Recess)

Q. Captain Baxter, when the time came at the disciplinary hearing that the attorney problem had been taken care of and that only Mr. Palmigiano was in there, with no attorneys, and, of course, Flint was present with his tape recorder, you then told him what he was charged with. A. Yes, sir; I then read the disciplinary report.

The Court: You read the disciplinary report.

Q. Now I show you Plaintiff's Exhibit No. 1, and I am going to go through it, before getting into further questions, page by page, and ask you what pages you had in your possession at the time that the hearing commenced. Did you have page No. 1, of course, without the final disposition written in,—

The Court: You mean the portion above the signature of Mr.—

Mr. Fortunato: —Gorton.

Q. (Continued) Don't you agree—and also the several lines [162] Captain Brule said he filled in?

In other words, directing your attention to the first page of Plaintiff's Exhibit No. 1, you had that page in your possession and it was filled in from the bottom of the page where it says ''Disposition of Case by Disciplinary Board,'' up to the top of the page? A. Yes, sir.

The Court: You mean that portion of page 1 that precedes the decision.

Mr. Fortunato: Yes, your Honor.

Q. And then the second page of Plaintiff's Exhibit No. 1, titled ''Superior's investigation,'' and which has the signature of Ronald Brule on it—you had that in your possession? A. Yes, sir.

Q. On pages 3 and 4 there is a report filled out by Ronald Brule that went to Deputy Remillard. Did you have that in your possession? A. No, sir.

Q. Have you ever seen it before? A. I have seen it since then but I hadn't seen it before.

The Court: You are referring now to pages 3 and 4?

The Witness: Yes, sir.

Q. You had never seen this letter and its contents prior to the hearing on November 13th? A. No, sir; I don't believe so.

[163] The Court: Nor at the hearing?

The Witness: No, sir; not at the hearing.

Q. Are you sure that you never saw it prior to the hearing? A. No, sir; I don't believe I saw it prior to the hearing.

Q. And page 5 of the exhibit is a paper referring to an inmate called Alfredo Pelleccia, signed by one James Gould. Had you seen that prior to the November 13th hearing? A. I don't know if that was going to be heard —the Pelleccia case—but the Pelleccia case was postponed.

Q. Has the Pelleccia case been heard, by the way? A. No, sir; he asked for another postponement yesterday.

Q. On the 13th it was postponed until yesterday? A. It was postponed for one week, and then it was going to be heard yesterday, and he asked for another postponement until Friday.

Q. On the last page, the sixth page of Exhibit No. 1 for the plaintiff, is a document signed by Luther Gorton which makes reference to Mr. Pelleccia and also to one James Madden, who, as the document says, "appeared to me to be sick." That is what part of the document says. Had you seen this prior to the hearing of November 13th? A. I don't recall if I did or not.

Q. Now directing your attention to the first page of Plaintiff's Exhibit No. 1 and the wording which appears above the signature of Luther Gorton — "L. Gorton," it is signed — did you read any of that printing to Mr. Palmigiano? [164] A. Yes, sir; I did.

The Court: You read that to Palmigiano?

The Witness: Yes, sir.

Q. Which portion did you read? Would you tell the Court what you said in general? A. I read the entire—the date and the time of infraction, his name, and the entire entity.

The Court: You read the entire statement bearing Gorton's signature?

The Witness: Yes, sir.

Q. Did you read anything else to Mr. Palmigiano? A. Yes, sir; I believe I read page 2, Captain Brule's investigation report.

The Court: You read what, please?

The Witness: The superior's investigation.

The Court: You also read that?

The Witness: Yes, sir.

Q. That being page 2 of Plaintiff's Exhibit No. 1. A. Yes, sir.

Q. Did you read any other document to Mr. Palmigiano? A. I don't believe so, sir. I don't know. It is on the tape.

The Court: It is on the tape.

Q. As you sit here now, though, your present recollection is you don't believe you read from any other document to him? A. I don't recall, sir.

[165] Q. It is the normal practice at the institution to just read from these two documents. Is that it? A. Yes, sir.

Q. Did you advise him that he had a right to remain silent? A. Yes, sir.

Q. And did you advise him anything that he said might be used against him? A. Might possibly be used against him; yes, sir.

Q. You told him that? A. Yes, sir.

Q. And was that taped by Mr. Flint? A. Yes, sir; I believe it was.

Q. Did you call any witnesses, either inmates or guards, or any other person, for that matter, to testify for or against Mr. Palmigiano? A. No, sir.

Q. Did you consider any photographs of any purported incidents that Mr. Palmigiano might have engaged in in determining this case? A. No, sir.

The Court: Were there any such photographs?

Mr. Fortunato: I wouldn't know, your Honor. I don't believe there were but I just wanted to know.

Mr. Allen: I know of none, your Honor.

Q. Did you have any occasion to receive into evidence any tape [166] recordings that would have recorded any evidence to be considered for or against Mr. Palmigiano? A. No, sir.

The Court: What tape recording are you referring to now?

Mr. Fortunato: I am asking, your Honor, the chairman of the disciplinary board exactly what type of evidence—

The Court: You made reference to tape recordings.

Mr. Fortunato: If in fact any were in existence, did he consider any; and his answer was no.

The Court: Tape recordings of what; some actions—

Mr. Fortunato: Yes, that would have indicated violation of prison rules.

Q. At the time that you read the charge to Mr. Palmigiano was Deputy Warden Remillard also present in the room? A. I don't really know. He left at one point, but at which point he left I don't really know. I think he may have been.

The Court: You think he may have been there?

The Witness: But you are not certain?

The Witness: No, sir.

Q. You were the chairman of the board. Is that correct? A. Yes, sir.

Q. And after you read the charge to Mr. Palmigiano, did he indicate that he chose to remain silent? A. Yes, sir; he did.

[167] The Court: What did he say? Let's not drawn any conclusions.

The Witness: I believe he said, "I stand mute."

The Court: That is all he said?

The Witness: Yes, sir.

Q. Did he at any time make a request to have his attorney present? A. I believe he did, sir.

The Court: When was that request made: At the outset, when they all came in there, or afterwards?

The Witness: At several points before the hearing and during the hearing, right after I read the charges, I believe he requested, or Robert Flint requested for him,—one of the two.

The Court: Flint requested?

The Witness: It was either him or Palmigiano. It was either Flint or Palmigiano requested.

The Court: Requested what?

The Witness: The attorney be present at the hearing.

Q. And the charges were read by you. Is that correct? A. Yes, sir.

Q. And after Mr. Palmigiano informed you that he chose to remain mute, did you make a response to him? A. I probably did. But what I said, I don't recall.

Q. As a result of Mr. Palmigiano's remaining mute, did you have any occasion to tell Mr. Palmigiano that there was nothing further for the disciplinary board to do but to consider the case? [168] A. Yes, sir.

Q. And when it came time, or at that time, when you decided to consider the case, was Mr. Palmigiano asked to leave the room? A. Yes, sir.

Q. Did he leave the room? A. Yes, sir.

Q. And Mr. Flint left the room also at that time? A. Yes, sir.

Q. About how long were they out of the room? A. I don't know how long the board took to render a decision. I don't really recall how much time was involved.

Q. Could you approximate? Was it approximately five, ten minutes, thereabouts? A. Around that, sir.

Q. After the five- or ten-minute absence of Mr. Palmigiano he was called back into the room? A. Yes, sir.

Q. Did Flint come back in too? A. Yes, sir.

Q. What did you say to Palmigiano at that point? A. I believe I read him the results of the disciplinary board findings.

Q. Do you have a present memory of what those findings were? A. I believe we found him guilty.

Q. Would it help you to look at the disposition?

[169] "Board finds inmate guilty. He stood mute and did not call any witnesses. Board has no alternative but to go on disciplinary report. 30 days Segregation B, 30 days loss of good time. Board recommends inmate be seen by classification board for possible downgrading."

Q. You have just read from the first page of Plaintiff's Exhibit No. 1? A. Yes, sir.

Q. The handwriting appearing beneath the words: "Disposition of case by disciplinary board." A. Yes, sir.

Q. Whose handwriting is that? A. Mine, sir.

Q. Does your signature appear thereon? A. Yes, sir; right there. (indicating)

Q. Did the other members of the board sign? A. Yes, sir.

Q. Did they sign in your presence? A. Yes, sir.

Q. So one signature is by Mr. Siner? A. Yes, sir.

Q. You saw him sign. And Mr. Carney signed it too. A. Yes, sir.

Q. Did you inform Mr. Palmigiano of the decision in the words or very similar words to the ones you just read from the bottom of [170] the page? A. Yes, sir.

Q. Did you have any further discussion with him as to the reasons for your decision? A. I asked him if he wanted to appeal.

The Court: You asked him if he wanted to appeal?

The Witness: Yes, sir.

The Court: What was his reply?

The Witness: Yes, sir. He said he wanted to appeal.

Q. Did he say he wanted to appeal or did anyone else say there might be an appeal? A. It could have been Robert Flint. I don't really recall.

Q. So far as your findings and decisions are concerned in this entire case regarding Mr. Palmigiano, is it fair to say that all of the findings and conclusions of the disciplinary board are set forth on page 1 of Plaintiff's Exhibit No. 1 beneath the words: "Disposition of Case by Disciplinary Board"?

The Court: What is that question again?

(Last question read)

A. No; page 1 and page 2.

The Court: Page 1 and page 2.

Q. In other words, page 2, the superior's investigation which is signed by Ronald Brule,—is that part of your decision? A. That was part of the board's decision, yes.

The Court: This is the investigation by the Captain? [171] The Witness: Yes, sir.

The Court: You say that was part of the board's—

The Witness: That was read at the disciplinary board also.

Q. You read it to Mr. Palmigiano? A. Yes, sir. And the board members also heard that investigation report.

Q. But referring to page 2, which Captain Brule prepared, I mean you never prepared page 2, did you? A. No, sir.

Q. And that is Brule's signature, not yours. A. Yes, sir.

Q. That is all Brule's work on page 2. A. Right.

Q. And the only thing written down by the board— A. —is that below disciplinary case report and to the bottom of the page.

Q. In other words, page 1, "Disposition of Case by Disciplinary Board," that is the only written documents or memoranda prepared by the disciplinary board in this matter. A. Yes, sir.

The Court: Was an appeal taken, do you know, Captain?

The Witness: Yes, sir; I believe it was.

The Court: Claimed by Flint or by the plaintiff?

The Witness: The warden handled the appeal, sir.

The Court: Appeal was claimed.

[172] Mr. Fortunato: One moment, please, your Honor.

(A pause)

Q. During the hearing, after all the attorneys left, was anybody present in the room at any time besides Deputy Warden Remillard, yourself, Mr. Carney, Mr. Siner, Mr. Flint, and Mr. Palmigiano?A. No, sir; not to my knowledge.

Q. And when Mr. Palmigiano and Mr. Flint were out of the room and you had your discussion with your other board members—I don't want to go into all the details, but did you discuss the silence of Mr. Palmigiano?

Mr. Allen: Object.

The Court: I will hear you on it.

Mr. Allen: Your Honor please, I think to go into the internal meditations or considerations of the board in coming to a conclusion is far beyond the scope. In other words, he can ask him, if he wants, what evidence he relied on, or the board relied on, but to invade—

The Court: I think you have got something there. I will sustain the objection as to form.

Q. What objects or items did you have before you,—

The Court: What objects or items?

Q. (Continued) — or documents, Captain Baxter, did you and the board have before you and which you considered to be evidence against Mr. Palmigiano? A. We had the disciplinary report. We had the superior officer's [173] report,—

The Court: Disciplinary report. That is Gorton's?

The Witness: Yes, sir.

A. (Continued) — Captain Brule's investigation report, and our knowledge of the institution.

The Court: And your knowledge of the institution?

The Witness: Yes, sir.

The Court: Meaning what?

The Witness: What we considered to be good order of the institution.

Q. When you say you had these reports, in effect you are referring to page 1 and page 2 of Plaintiff's Exhibit No. 1? A. Yes, sir.

Q. And did you consider as evidence in coming to your conclusion the fact that Mr. Palmigiano didn't say anything? A. Yes, sir.

Q. And what conclusions did you draw from that? A. We stood on the reports in front of us.

The Court: Relied on the reports?

The Witness: Relied on the reports as the evidence of the case.

Mr. Fortunato: I have nothing further, your Honor.

Cross-examination by Mr. Allen

XQ. Captain Baxter, how long have you been a correctional officer at [174] the ACI? A. 16 years, sir.

XQ. And you recognize the signature of Officer Gorton on that report? A. Yes, sir.

XQ. And you recognize the signature of Captain Brule on his portion of the report? A. Yes, sir.

XQ. Did Palmigiano ever request to cross-examine Brule or Gorton? A. No, sir.

The Court: Did Flint?

The Witness: No, sir.

XQ. Did Flint or Palmigiano ever request that any witnesses be brought into the hearing room to testify in behalf of Palmigiano? A. No, sir.

Mr. Allen: May I have B for identification?

The Court: B for identification.

XQ. I show you an object, Captain. Do you recognize it? A. Yes, sir.

XQ. Will you tell the Court what it is? A. It is a tape recording of the disciplinary hearing.

XQ. How do you know that that is the tape of the disciplinary hearing as opposed to a rock band? A. It has Mr. Palmigiano's name on it.

XQ. Did you see that writing put on that object? A. Yes, sir.

[175] XQ. Who put the writing on the object? A. Robert Flint.

XQ. And you saw him do it? A. Yes, sir.

XQ. And what became of the tape after the hearing? A. Well, it was supposed to go to me, entrusted to me to go through the proper channels to the warden. But after the tape was shut off, Robert Flint gave it to Mr. Siner to deliver to the warden's office.

XQ. You saw him hand it to Mr. Siner? A. Yes, sir.

XQ. And you recognize that as being the same tape cartridge that— A. He handed it to me. Then I put it on the desk, and he picked it up and it ended up with Mr. Siner.

XQ. You recognize it as the identical one you saw on November 13th at the board? A. Yes, sir.

Mr. Allen: At this time, your Honor, I would like to play the tape so that the witness can identify the voices on the tape and attest that the tape fairly and accurately reproduces everything that transpired before the board so that the Court will have a transcript, in effect, of the hearing.

Mr. Fortunato: I object, your Honor.

The Court: What is the objection?

Mr. Fortunato: That it has not been shown as yet the [176] witness does not have a present recollection of what took place at that hearing.

The Court: That may well be. It would seem if there is a tape of the hearing, conceivably it could be more accurate than any individual's recollections. If there is no dispute about the tape being the tape recording being made at the time, and this is the tape recording that was made at that time and it was made by Mr. Flint, the advocate for the plaintiff here, I think it is highly relevant.

Mr. Fortunato: Your Honor, not to press things, I think your Honor might have made a slight mistake. The testimony to date, I think, has been that Mr. Flint has suggested he is an NPRA advocate, a National Prison Reform Association advocate, and is not in any way the advocate—

The Court: Certainly the evidence up to now has indicated he appeared as an advocate for the plaintiff. I don't have any illusions about that. What was he doing there?

Mr. Fortunato: He was running a tape, we would submit, your Honor.

The Court: I am not that naive. How long would it take to play this tape?

Mr. Allen: 16 minutes, your Honor.

The Court: It may be marked a full exhibit.

Mr. Fortunato: I listened to the tape after the Court suggested that would be an appropriate thing to do yesterday [177] afternoon. Not to further convolute the cast of characters at this hearing, the initial portion of the events that took place at the hearing are not on that tape.

There is no big dispute. I want to clear this up. The initial time that I went in with Mr. Palmigiano by myself and had a brief discussion with Mr. Baxter—

The Court: You went in with Mr. Palmigiano.

Mr. Fortunato: The first time; right. Then we left after being told an attorney could not be present. What went on during that absence is not on the tape. The tape picks up when the whole group comes back in later.

The Court: We will bear that in mind but I don't think it makes much difference. It may be marked a full exhibit, Exhibit B, and we will stop here until 2:00 o'clock. There will be no interruption with respect to the tape recording.

(Defendants' Exhibit B for identification marked in evidence)

(Noon Recess)

AFTERNOON SESSION

2:00 P.M.

The Court: I will change my position, gentlemen, so I will be able to hear better.

Mr. Allen: May we proceed, your Honor?

[178] The Court: Certainly.

XQ. (By Mr. Allen) Now, Captain, I am going to ask you from time to time who the speakers are on this tape. I am going to ask you again for the record. I have put Respondents' Exhibit B, which I asked you to examine earlier,—the tape cassette—in the machine.

You were present when that tape was made, were you not? A. Yes, sir.

Mr. Allen: As we play this, I am going to start it and stop it, and ask you who the speakers are. All I want you to do is tell me who the person is who spoke just before I shut it off, so the Court will come to know who the various cast of characters are on the tape.

I am now starting the tape.

(Tape played as follows:)

"Testing 1, 2, 3. Try playing it; try playing it; try playing it."

The Court: What is that?

Mr. Allen: They are fussing around with it in the beginning, your Honor, to try to make it work.

(Playing of tape resumed as follows)

"The next case that will be recorded is that of Nicholas A. Palmigiano. Chairman of the Board on today's date, November 13th, is Captain Baxter; and from Classification Department is Mr. Siner; and also [179] a voting member of the board is Officer Carney. The board is about to begin."

XQ. Who was that speaking? A. Robert Flint.

Mr. Allen: I will now start the tape again.

The Court: Flint described the nature of the hearing and the membership of the board. Right?

Mr. Allen: Yes, your Honor.

(Playing of tape resumed as follows:)

"The tape we are just playing. We seem to be having a little difficulty with it at the moment. The tape is now playing."

The Court: Who was that speaking?

The Witness: Robert.

(Playing of tape resumed as follows:)

"We want to keep going here so that we can accomplish something this afternoon. I mean: Is there any reason for playing the tape over and over again at this time or . . ."

XQ. Whose voice is that? A. Deputy Warden Remillard.

XQ. Let me ask you: Where was this hearing being held? A. In his office.

The Court: Remillard's office?

The Witness: Yes, sir.

[180] (Playing of tape resumed as follows:)

"The tape is not being played over and over again. What we are doing is trying to get the tape recorder in operation so that this proceeding may be recorded in accordance with the rules and regulations laid down by Judge Pettine.

"Okay.

"And that is why we have all been fooling around, as you call it, with the tape recorder. And the board has already been introduced, and this is Steve Fortunato, who is an attorney, acting on behalf of Nicholas A. Palmigiano."

XQ. Who was that again? A. That was Mr. Fortunato—

XQ. No, I mean — A. Robert Flint introducing Mr. Fortunato.

(Playing of tape resumed as follows:)

"Yeah, this is Steve Fortunato, attorney for Nicholas Palmigiano. And when I was in the room about five minutes ago I was informed that no attorneys would be present. And then I asked for a few minutes to confer outside of this room with Nicholas Palmigiano, my client, to determine what course of action we should pursue. While I was conferring with Mr. Palmigiano, Deputy Warden Remillard introduced himself to me and did mention that [181] this was the policy and that I had the right to advise my client to remain mute throughout the proceedings but that would be a detriment to his defense. I then conferred, in the absence of Deputy Warden Remillard, with my client and advised him that in light of the fact there were possible future criminal proceedings pending, that he should not proceed at this time because he would be at a substantial disadvantage, both in putting on his own case, and in cross-examining and confronting those witnesses who would be put on by the prison officials against him. So, therefore, we will not remain for this — this matter now. I should — I do not say remain for this 'hearing' because I don't regard it to be a constitutionally permissible hearing because without counsel present and with the threat of possible criminal prosecutions it is not a constitutionally permissible hearing."

XQ. Who was that? A. That was Mr. Fortunato.

The Court: Would it be possible to play that back?

Mr. Allen: Yes, your Honor.

The Court: From the very beginning. I mean Mr. Fortunato's statement.

(Last portion of tape played back)

(Playing of tape resumed as follows:)

[182] "There is also an institutional policy — I was looking for it and I will see if I can find it — where

a postponement may be allowed up to one week but then the case will be heard. This is the directive from the warden."

XQ. Who was that speaking? A. The last person speaking was Deputy Warden Remillard.

Mr. Allen: Would you like to hear that again, your Honor?

The Court: I would, yes.

(Last portion of tape played back)

(Playing of tape resumed as follows:)

"I was just going to ask him."

XQ. Who made the remark: "I was just going to ask him"? A. I think I did. I made that remark.

(Playing of tape resumed as follows:)

"Nick, would you care for a one-week postponement?"

The Witness: I said that.

The Court: That question was asked of him by whom?

The Witness: By me.

(Playing of tape resumed as follows:)

"If he can go back to the population."

XQ. Who answered it? A. I believe Mr. Fortunato.

The Court: What was the answer?

Mr. Allen: I backed up to hear the question again. Now here comes the answer.

[183] (Playing of tape resumed as follows:)

"If he can go back to the population."

The Court: This is Mr. Fortunato?

Mr. Fortunato: Yes.

(Playing of tape resumed as follows:)

"He goes back to the status he was in.

"I see. And also a question as to a postponement from what, from this type of hearing to the same type in a week?

"Same type of hearing, yes. If he wants a week, we will give him a week.

"Without counsel.

"The hearing will be the same as it is right now."

XQ. Who made that remark: "The hearing will be the same as it is right now"? A. I did.

(Playing of tape resumed as follows:)

"He may have inmate counsel, NPRA representative, or a classification counselor. But this is what is allowed."

The Witness: The last person speaking?

Mr. Allen: Yes.

The Witness: Deputy Remillard.

(Playing of tape resumed as follows:)

"This is Deputy Warden Remillard just spoke.

[184] "In light of what you said, that the hearing a week from now would be conducted on the same ground rules as the one that you have scheduled for today, we will not ask for a postponement because we don't even consider it a hearing to be postponed from. And Mr. Palmigiano has been present throughout — throughout this."

Mr. Allen: Fortunato.

(Playing of tape resumed as follows:)

"Who are the other people present just so we can — have you got it all on there?

"Well, I named the board but I did not name the Deputy Warden Remillard . . . ."

XQ. Who is speaking now? A. Robert Flint.

(Playing of tape resumed as follows:)

". . . He was also present. And, in addition, was Ralph Gonnella, who is an external director and an attorney-at-law for the Inmate Legal Assistance Program. And he was present, and an external director on the NPRA. And myself, Robert W. Flint, as advocate on behalf of the NPRA prisoners, and Allegra Munson, who is an advisor to the NPRA and also an attorney-at-law. And, of course, the defendant, Nick Palmigiano."

Mr. Fortunato: Could that section be played back again, please?

[185] (Last portion of tape played back)

The Court: Who is making this statement?

Mr. Burke: Flint.

XQ. Is that correct, Captain Baxter? Was it Flint making that statement? A. Just this last statement; yes, sir.

XQ. In which he says: "And myself, Robert W. Flint, as advocate on behalf of the NPRA prisoners, . . ."? A. Yes, sir.

XQ. That is him? A. Yes, sir.

XQ. Now the tape appears to stop at this point, Captain Baxter. What happened? A. I don't know. I guess Flint wasn't familiar with running a tape recorder and he had a lot of problems with it.

XQ. Did he leave the room at any point during this — A. He went out when they went out to confer in the hallway outside the office.

XQ. Did he leave the tape running while he was outside? A. No, no.

(Playing of tape resumed as follows:)

"Okay. The people who were previously here have left the room. Now only in the room is Deputy Warden Remillard, Captain Baxter, Mr. Siner, Mr. Carney, and the only voting members are Captain Baxter, Mr. Siner, [186] and Officer Carney. And, also, prisoner advocate, Robert W. Flint, and Nicholas A. Palmigiano is present."

XQ. Who is that speaker? A. Robert Flint.

XQ. And was Palmigiano in fact in the room when he made this statement? A. Yes, sir; when he made that statement.

(Playing of tape resumed as follows:)

"The Deputy Warden wants to make some comments about some delay.

"No, I am not making any comments of some delay. I just want to make it clear that I am here doing other work, and I will not interfere or speak for or against anything that happens before this board.

"Well, do you think your presence may have some or any influence upon the board members insofar as their deliberations are concerned?"

XQ. Who is asking him that question? A. The first speaker was the deputy. The second speaker was Robert Flint.

(Playing of tape resumed as follows:)

"It certainly has some potential influence upon them."

The Court: Who said that?

The Witness: Flint.

(Playing of tape resumed as follows:)

[187] "Leave deliberations. Okay?

"I will even go that far for you people, leave my own office. All right. Anything else you want?

"This is a meeting of the disciplinary board. Nicholas Palmigiano, what is your date of birth?"

XQ. Speaker? A. That is me.

(Playing of tape resumed as follows:)

"Captain, sir, if the answer can't be heard, I would like to pass the mike over.

"May 30th, 1938."

XQ. Who was that speaker? A. That is Nick Palmigiano.

The Court: "May 30th, 1938"?

The Witness: That is his date of birth.

(Playing of tape resumed as follows:)

"November the 11th, 1972, at 8:15 p.m., you were booked by Mr. Gorton . . . ."

XQ. Who is the speaker now? A. I believe it is me.

(Playing of tape resumed as follows:)

"Charges: 'Inciting a disturbance and disruption of the ACI operations, which might have resulted in a riot. At 8:50 P.M., and from then until 9:05 P.M., I saw and heard inmate Palmigiano going among the other inmates and [188] telling them not to go to their cells when the buzzer sounded at 9:00 P.M.' Inmates's attitude is listed here as 'Poor and demanding.' The officer, Mr. Gorton, notified Captain Brule. Captain Brule investigated the case. 'Inmate denies infraction as written, he says the reason he came to the Rear Hall to see me was that I had informed — I had been informed by other inmates earlier in the evening of an inmate, James Madden, being sick and that I had taken no action by 8:45 P.M.'. . ."

XQ. Who is speaking now? A. I am speaking.

XQ. Were you reading from some document? A. Reading from the disciplinary report and the superior officer's report.

XQ. Which you have been shown earlier as an exhibit in this case — a copy of which you have been shown earlier? A. Yes.

The Court: This was Captain Baxter speaking?

The Witness: Yes.

(Playing of tape resumed as follows:)

". . . 'He says the reason no one went to their cells was that I had not and would not do — would not do my job, under pressure.'. . ."

" 'Until pressured.' "

" 'Until pressured.' "

[189] "That was Mr. Remillard who just helped read the book who previously said he would not interfere with the proceedings: 'I was just in there doing office work.' "

XQ. Who is that speaking? A. That is Robert Flint.

(Playing of tape resumed as follows:)

"May I say at this time that I am leaving the office so that nobody can feel that I am prejudicing the board in any way?"

XQ. Who was that? A. Deputy Remillard.

XQ. Did he in fact leave the office? A. I believe he did at that moment.

XQ. As a matter of fact, have you heard this tape before? A. Yes, sir.

XQ. Can you hear the door closing behind him on the tape? A. I don't know. I don't recall.

(Playing of tape resumed as follows:)

"Thank you for leaving.

" 'Inmate Palmigiano says he is not sorry and would take similar action again if necessary. Inmate Palmigiano was informed to contact his lawyer, that he — as he may be prosecuted for a violation of state law. Inmate Palmigiano ordered tagged and fed in. He defiantly appears to be a threat — definitely appears to be a [190] threat to the security and order of the Institution.' Signed: 'Captain Brule.' . . ."

XQ. Now who is speaking? A. Me.

XQ. You, Captain Baxter? A. Captain Baxter.

The Court: You were reading the report of —

The Witness: I was reading the report of Captain Brule.

XQ. And Palmigiano was in the room facing you? A. Yes, sir.

(Playing of tape resumed as follows:)

"What happened here, Nick?

"In view of the fact that you just said that this particular book may be the subject of criminal prosecution or some kind of a criminal case, we feel that it is necessary that an attorney be present at this board hearing because to proceed is only a farce because a man cannot adequately defend himself at such a hearing without the assistance of counsel with the pending disciplinary matter before the board, as written into the report."

XQ. Who was that speaking? A. Robert Flint.

(Playing of tape resumed as follows:)

"At this time I have to take my attorney's advice and remain mute. . . ."

[191] The Witness: Nicholas Palmigiano.

The Court: ". . . take my attorney's advice and remain mute." All right.

(Playing of tape resumed as follows:)

"I would also re-ask if my attorney could be present."

The Court: I didn't get that.

(Last portion of tape played back)

(Playing of tape resumed as follows:)

"His request is that an attorney be present and it might be noted that the attorney is right outside the door and available to this board. It is the same Mr. Fortunato who was in here just a few minutes ago. He is an attorney at law."

XQ. Now after Palmigiano finished speaking, who was the next speaker? A. Robert Flint.

(Playing of tape resumed as follows:)

"Disciplinary boards are disciplinary boards. They are not a court of law. They will be treated as a disciplinary case. You have been offered a postponement. You refused it. We do not have, as an institutional policy, attorneys sitting in on disciplinary hearings. Your request is denied."

XQ. Who was that, Captain? A. Captain Baxter.

(Playing of tape resumed as follows:)

[192] "I would like to point out that under the rules and regulations governing disciplinary procedures, especially at a board, on page 17, Section I, it is clearly written that 'Whenever an inmate is charged with an institutional violation which may be the subject of criminal prosecution, the written notice referred to in paragraphs E and F above shall so notify the inmate, and advise him that although statements he makes in his defense at a disciplinary hearing are probably not admissible for affirmative use by the prosecution at a trial, he may wish to consult an attorney to determine what action to take.' In view of this language and in view of the fact that an attorney is right outside the door we persist in our request that you make an attorney available to Nicholas Palmigiano in this particular matter."

XQ. Who is that? A. Robert Flint.

(Playing of tape resumed as follows:)

"I have already answered that question. The request for an attorney is denied.

"We object most strenuously to any action being had on this matter without an attorney being present in this room.

"Do you intend to answer any questions for the board?"

[193] XQ. Who was that speaking? A. That was Flint.

Mr. Allen: I want to go back.

(Last portion of tape played back as follows:)

"I have already answered that question. The request for an attorney is denied."

XQ. Who is that? A. That is me.

(Last portion of tape played back as follows:)

"We object most strenuously to any action being had on this matter without an attorney being present in this room."

XQ. Who is that? A. Robert Flint.

(Last portion of tape played back as follows:)

"Do you intend to answer any questions for the board?

"No."

XQ. Who asked that question and who answered it? A. I asked Nick Palmigiano that question, and he answered it.

(Playing of tape resumed as follows:)

"You can step outside. We will call you back in."

The Court: What was that?

Mr. Allen: I will play that again. It is a little confusing right there.

(Last portion of tape played back)

[194] The Court: Who said: "You can step outside."?

The Witness: I did.

The Court: You told Palmigiano to step outside?

The Witness: Yes, sir.

XQ. Now the tape apparently stopped there. Is there a reason for that, Captain? A. Yes, the board was making the decision on the case.

(Playing of tape resumed as follows:)

"After being told to leave the room while the board deliberated for approximately five minutes, Flint and Palmigiano are now back in the room where this board is taking place allegedly.

"The board finds the inmate guilty . . ."

XQ. Who made that introductory statement? A. Flint made the introductory statement. Now I am speaking.

(Playing of tape resumed as follows:)

"The board finds the inmate guilty. He stood mute and did not call any witnesses. The board has no alternative but to go on the disciplinary report — what

is written on the disciplinary report. The sentence is 30 days' Segregation B, 30 days' loss of good time; the board recommends that Nick Palmigiano be seen by the Classification Board for possible downgrading. Do you wish to appeal?

"We do appeal the entire action of this board today —"

XQ. Who is speaking now?

[195] The Court: Just a moment. 30 days' segregation?

Mr. Allen: I will run it again.

(Last portion played back)

(Playing of tape resumed as follows:)

"We do appeal the entire action of this board today — the entire action of the board today; most strenuously object to the board's deliberations and this disciplinary action — alleged disciplinary action being taken; most strenuously voice objection to it. And we do appeal to any existing authorities within the State of Rhode Island insofar as the action of this board is concerned today.

"Your appeal is so noted. You will return to the status you were in before you hit the board."

The Court: What is that again? This statement was made by whom: "We do appeal the entire action . . ."?

The Witness: Robert Flint.

(Last portion of tape played back)

XQ. Who made that last statement? A. I did.

The Court: To whom was that addressed?

XQ. Whom was that addressed to? A. My address was made to both Nick Palmigiano and Robert Flint that appeal was noted and he was returned to the status before he hit the board.

The Court: Hit the board?

[196] The Witness: — he came to the board.

The Court: You used the words: "Hit the board"?

The Witness: Yes, sir; I did.

XQ. Is that prison slang? A. It is my own, sir.

Mr. Allen: I want to make sure we have it this time.

(Last portion of tape played back)

(Playing of tape resumed as follows:)

"We will put these tapes into your hands, Captain Baxter, in a sealed envelope and we will assume that you are going to make these available to whatever authorities may request them. Is this so?

"Yes, sir; that is so.

"All right. Captain Baxter is assuming responsibility for this tape."

The Court: Perhaps you had better play that back for Mrs. Archambault.

Mr. Allen: I told Mrs. Archambault I would leave her the tape and player. I will leave her the player, and I am sure Mr. McQueeney will make arrangements for Mrs. Archambault to hear the tape at her leisure.

The Court: I think you had better play it back in the presence of counsel.

Mr. Allen: All right.

[197] (Last portion of tape played back as follows:)

". . . You will return to the status you were in before you hit the board."

The Court: Let's go back further than that.

(Last portion of tape played back as follows:)

"Do you wish to appeal?

"We do appeal the entire action of this board today — the entire action of the board today; most strenuously object to the board's deliberations and this disciplinary action — alleged disciplinary action being taken; most strenuously voice objection to it. And we do appeal to any existing authorities within the State of Rhode Island insofar as the action of this board is concerned today.

"Your appeal is so noted. You will return to the status you were in before you hit the board.

"We will put these tapes into your hands, Captain Baxter, in a sealed envelope and we will assume that you are going to make these available to whatever authorities may request them. Is this so?

"Yes, sir; that is so.

"All right. Captain Baxter is assuming responsibility for this tape."

(Playing of tape concluded)

XQ. (By Mr. Allen) Is there anything more that transpired after that, Captain? [198] A. I don't believe so. I think that is it.

Mr. Allen: I represent to the Court I have listened to it for another five minutes and there is nothing more on it.

XQ. Captain, I ask you: Is this an accurate transcription of what transpired on November 13th during the Palmigiano hearing? A. Yes, sir.

XQ. Have there been any deletions? In other words, was anything said there, that you know of, that is not on the tape? A. Not to my knowledge, sir.

There is one point I would like to raise. According to the tape I was placed in charge of the tape. And after the tape was shut off, Robert Flint decided that it would probably be safer in Mr. Siner's hands and he got the tape and he delivered it to the warden's office.

The Court: Flint gave the tape to Siner?

The Witness: Yes, sir. After he put this on the tape, that I was in charge of the tape, it went to Mr. Siner's hands.

The Court: And he delivered it to the warden?

The Witness: Yes, sir.

Mr. Allen: I have no further questions of the witness. You may inquire.

Redirect Examination by Mr. Fortunato

Q. Now, Captain Baxter, have you served on disciplinary boards before? A. Yes, sir.

[199] Q. Had you wanted to, you could have called Brule or Mr. Gorton or anybody else you chose to. A. Well, it would have created a problem to call them. It wasn't their shift. They weren't on.

Q. But I mean you have the authority to. If a captain, who is conducting a disciplinary hearing, says to another officer, "I would like you to be present to give some evidence," they would come. Is that part of the normal custom and practice? A. If it involved overtime, I would have to check with my superiors to okay the overtime.

Q. Is that done or can that be done? A. I have never—

Q. Whatever the financial arrangements are for the men who come and testify, you can bring in other witnesses, inmates or guards, to testify at a hearing on behalf of the prison officials. A. I would have to acquire permission to pay the overtime; yes, sir.

The Court: That would be overtime to whom, Gorton?

The Witness: Yes, sir; Gorton and Captain Brule are on another shift.

Q. I mean — the point I am making is you have the authority to do that under the rules, don't you, should you want to? A. I would have to get the authorization for paying the overtime first. Then I could do it.

Q. Leaving the budgetary considerations to somebody else, I mean, as [200] a captain in charge of a disciplinary board, I know you don't have subpoena power but you can ask pople in the institution to come in and give testimony at a hearing that is being conducted. A. Yes, sir.

Q. You can? A. Yes, sir.

Mr. Fortunato: I have nothing further.

Mr. Allen: No further questions, your Honor.

FRANCIS A. HOWARD, Sworn

Direct Examination by Mr. Fortunato

Q. Sir, what is your occupation? A. I am warden of the ACI.

Q. How long have you held that position? A. A little better than two years.

Q. Generally, as warden, what do your duties consist of? A. I oversee the operation of the ACI.

Q. You are the chief administrator of the Adult Correctional Institutions? A. Right.

Q. Do you know Nicholas Palmigiano? A. I do.

Q. He is confined therein under sentence of law? A. Yes.

Q. Directing your attention to November 14th, 1972, did you have any [201] occasion to review any disciplinary action that had been taken regarding Mr. Palmigiano on November 13th? A. I believe it was the day after the hearing?

Q. Yes, I think we can agree the hearing was on the 13th. A. Then I saw him on the 14th.

The Court: What, please?

The Witness: Then I had a brief meeting with Nicholas Palmigiano on the 14th.

Q. Did you have a meeting with him the day after the hearing? A. I did.

Q. The hearing being, of course, the one Captain Baxter presided over. A. Yes.

Q. Was the purpose of your inquiry on the 14th to review the actions of the disciplinary board? A. That is correct; also, to give Nick an opportunity to make any oral appeal he cared to.

Q. In reviewing the action of the disciplinary board, what documents if any did you have before you that had been sent to you by the disciplinary board? A. I had the original disciplinary report and the attached investigation report from Lieutenant Brule.

Q. I show you a copy now of the first page of Plaintiff's Exhibit No. 1. You had that first page? A. Yes.

[202] Q. It had all been filled out, including the handwriting at the bottom by Captain Baxter? A. Yes.

Q. And then you had the second page of the report, or, I should say, the second page of Plaintiff's Exhibit No. 1, which is Captain Brule's superior's investigation report. A. Yes.

Q. That came to you attached to the first sheet? A. Yes.

Q. Gorton's and Mr. Baxter's.

Were any other papers sent to you? A. I believe I had another report from Lieutenant Brule, a two-page report.

Q. I show you pages 3 and 4 of Plaintiff's Exhibit No. 1. A. Yes, I had that report also.

The Court: Is that another report of Captain Brule?

The Witness: Yes.

The Court: Pages 3 and 4; further report of Captain Brule.

Q. Do you recall having any other papers? A. I believe that is all I had. But I recall I may have read other reports from other personnel concerning the entire incident.

The Court: What is that, please?

The Witness: Concerning the incident of that evening, of the 11th.

Q. You might have read a report involving Alfredo Pelleccia. Correct? [203] Is that his name? A. Yes.

The Court: Alfredo who?

Mr. Fortunato: Pelleccia.

Q. Did you at sometime on the 14th determine to uphold the decision of the board? A. I did.

Q. And before making that determination had you heard the tape that was just played in this courtroom? A. I had not heard the tape.

Q. Before making your decision did you have any contact with Mr. Palmigiano? A. I did. I had possibly a five-minute meeting with Nick and Lieutenant Detonnancourt.

The Court: And what?

The Witness: One of my lieutenants, Detonnancourt.

The Court: Did you have this interview with them together or separately?

The Witness: The three of us sat in the deputy warden's office.

Q. And did you ask Mr. Palmigiano any questions? A. I did. I told him that I was considering his appeal at that time and I wanted to give him an opportunity to say anything he wanted to in his behalf. I told him I had the documents — I held them up — of the disciplinary board. He just looked at them. [204] And Nick replied that he was standing mute on the advice of his attorney.

Q. Did you talk personally to any witnesses to the incident at that time? A. I am not certain. Possibly Lieutenant Brule. But I am not certain of this.

The Court: Lieutenant who?

The Witness: Brule.

Q. You don't recall whether you saw Mr. Brule or not? A. I am not certain. I know I talked to Lieutenant Brule about this at some time, but it may have been after this hearing. And Lieutenant Brule is the only witness that I have talked with.

Q. And that may well have been after you made your decision on the 14th? A. Yes.

The Court: Your interview with Palmigiano, and whoever it was with him, occurred on the 14th of November?

The Witness: Yes, your Honor.

The Court: In the deputy warden's office?

The Witness: Correct.

The Court: But Captain Brule was not there?

The Witness: He was not there.

The Court: And your decision was made that day, was it?

The Witness: It was made shortly after that brief hearing.

The Court: So that the chances are you didn't see Captain [205] Brule until sometime later?

The Witness: Your Honor, my best guess is I did not talk to him about the incident that day or the day before.

Q. And was Mr. Palmigiano present when you told him what your decision was? A. Yes. I believe I told him I was going to deny his appeal.

Q. That was after you had asked him what he had to say, and he said he remained mute. Was it at that point you then said, "Well, I am going to have to deny your appeal."? A. Yes.

Q. Now do you know where Mr. Palmigiano was taken when you and he finished your meeting on the 14th? A. I do not. I assume he went back to his cell, but the routine at that point is as soon as I communicate the appeal has been denied, then the sentence is implemented. And I am sure it was either implemented that night or the following day.

Q. So you can say that on or about the evening of the 14th, or no later than the 15th, his sentence began as a result of the hearing of the disciplinary board. A. I would say in all probability that is what happened.

Q. At the present time is it true that he is in a section of the prison known as punitive segregation? A. Yes.

Q. And this is a result of the sentence? A. Yes.

[206] Q. And punitive segregation means he is under lock and key 23 hours a day? A. 24 hours a day for the first five days. Then it is 23 hours.

The Court: 24 hours a day —

The Witness: — for the first five days.

The Court: For the first five.

The Witness: All additional time would be for 23 hours per day.

Mr. Fortunato: Thank you.

Q. And he cannot see —

The Court: 30 days are involved here?

The Witness: Pardon me, your Honor?

The Court: The sentence here was 30 days?

The Witness: 30 days; correct.

The Court: So it would be 23 hours a day for —

The Witness: 25 days.

Q. And his visits are restricted to all but attorneys. Is that fair to say? A. Yes.

Q. He takes his meals in his cell? A. Yes.

Q. There are no other inmates walking around back there that can visit him. Everybody back there is in a cell. Is that true? A. Generally, yes.

Q. Are his reading restrictions different than those in general [207] population? A. Yes.

Q. Could you briefly tell us how they would be different? A. His selection of reading material is very limited. We do permit him to read — I don't know — one or two books a day. But if he were in population he would have the entire library available to him.

Q. How about any rehabilitative or educational functions while he is in punitive segregation?

The Court: Any rehabilitative or what?

Mr. Fortunato: Educational programs.

A. No.

Q. He cannot participate in any? A. Correct.

Q. Now prior to his being placed in panitive segregation, is it a true statement that one of his jobs at the prison — one of Mr. Palmigiano's jobs was that of barber? A. Yes.

Q. Does he receive payment for performing his duty? A. Yes.

Q. How much is he paid? A. I am not certain. I am told it is $1 a day. I know that is our maximum inmate wage.

Q. Does he receive any wages while kept in punitive segregation? A. He receives nothing, no wages.

[208] Q. Now do the findings of the disciplinary board and also your upholding their decision—does that become part of his permanent prison record? A. Yes.

Q. And that would be considered by any parole board that might review his case? A. Yes.

Q. And it would be considered by the classification board if they decide to classify him one way or the other? A. Yes.

Q. Or if he were to go into a work release program, they would take this disciplinary action in consideration? A. Yes.

Q. If prior to being placed in punitive—where he was in the general population, that is known as the maximum security building? A. Yes.

Q. You also have a minimum security building? A. Yes.

Q. And is there something in between minimum and maximum? A. We have a minimum-medium building. It is a combination of two categories, plus work release.

Q. For him to get into any of those categories from maximum his disciplinary report, including the records resulting from the hearing in court,—that would all be considered? [209] A. Yes.

Q. One of the recommendations of the disciplinary board, and which you upheld, was that the board recommended that the inmate be sent to the classification board for downgrading. Prior to the findings of this disciplinary board what classification did he have? A. He would be in class A.

Q. Could the classification board put him down into class B? A. They could.

Q. And if he went into class B, he would then be kept locked up for 23 hours a day. Is that true? A. Yes.

The Court: Locked up for 23 hours a day?

The Witness: Yes.

The Court: Seven days a week?

The Witness: Yes.

The Court: That means no yard privileges or anything of that sort?

The Witness: That is right.

Q. And that would commence to run when he finishes this 30 days if in fact the classification board goes along with the recommendation of the disciplinary board? A. Yes. I should explain. That is a recommendation to the classification board, and that is all it is. There is a five-man board that sits and votes, and the majority votes rule. In other [210] words, a disciplinary board is not considered a vote.

Q. I understand that, but they are recommending declassification. A. Yes.

Q. And you upheld their vote recommending downgrading—declassification. A. Yes.

Mr. Fortunato: One moment, please, your Honor.

The Court: Certainly.

(A pause)

Q. Now a man in class B—

The Court: Class B.

Mr. Fortunato: B.

Q. (Continued) — he also couldn't have a prison job and earn any money, could he?

Mr. Allen: Object. This is all a matter of law, your Honor. It all appears on pages 7 and 8 of Respondents' Exhibit A, and I suggest it is a matter of law and is appropriate to the Court's scrutiny.

The Court: 7 and 8?

Mr. Allen: Yes, your Honor. It commences on page 7, three-quarters of the way down the page, and continues through most of page 8, more than half of page 8.

Your Honor will observe that category B, which the witness is being asked about, is defined as a matter of law on those pages.

Q. Warden Howard, you are familiar with the regulations governing [211] disciplinary, classification, and mail procedures that have been promulgated pursuant to the case of *Morris* v. *Travisono*? A. Yes, I am.

Q. And you are the man entrusted with seeing that these are applied and carried out. A. Yes.

Q. Is it your understanding of classification B that a man cannot, while he is in classification B, work and perform services and receive payment for them?

Mr. Allen: Objection.

The Court: What is the objection?

Mr. Allen: The exhibit speaks for itself, as one ground; and the exhibit is a matter of law, not a matter of fact, and therefore not a subject for inquiry by counsel of the witness.

The Court: Is there anything in category B, to which you have referred, that makes any reference to whether or not compensation can be paid for work rendered?

Mr. Allen: Your Honor will see near the bottom of page 7 the last sentence:

"Work eligibility is suspended in this category . . ."

The Court: That would indicate then that he cannot work and cannot be compensated.

Mr. Allen: Yes, your Honor.

Your Honor will notice on page 8 it also addresses itself to the matter of time in the cell, yard privileges, mail, visiting [212] privileges, many other things.

The Court: I think I misunderstood the warden or he misunderstood my question. I thought the warden told me that he was restricted to his cell after the first five days for 23 hours a day and did not have yard privileges.

The Witness: That is correct, your Honor. We have been talking about two categories. Presently he is serving 30 days in punitive segregation. The first five days: No exercise out 24 hours a day.

The attorney then questioned me about classification B. That is another category which requires one hour of exercise every day.

The Court: But the additional 25 days of the sentence that has been imposed on him do not permit of any yard privileges, do they?

The Witness: It is during that one hour that would be optional with the administration to exercise him inside or out, weather conditions and manpower conditions controlling.

The Court: In other words, it is not an absolute right to him?

The Witness: No, but there is an absolute right to exercise, which means out of that cell walking somewhere.

Q. For one hour. A. For one hour.

Q. But to qualify it, under the sentence of 30 days he is in a [213] category known as punitive segregation. A. Right, which is different from segregation B.

Q. Which is different from segregation B, which he will be placed in,—

The Court: Assuming he is classified—

Q. (Continued) — assuming he is downgraded at the recommendation of the board. A. Yes.

The Court: Are there any specific provisions in these regulations relating to prisoners who are confined pursuant to punitive segregation?

Mr. Allen: Yes, your Honor; there are.

The Court: We have here categories A, B, and C.

Mr. Fortunato: On page 19, your Honor,—

The Court: Page 19?

Mr. Fortunato: Yes. —the third line down says:

"Actions Taken by a Disciplinary Board may be as follows:"

and No. 5 under that says:

"One to thirty days placement in punitive segregation."

The Court: I see that, yes.

Q. Warden Howard, anywhere in these regulations—that is, the ones promulgated pursuant to *Morris* v. *Travisono* —is there a definition of punitive segregation as such, that you are aware of? A. I am not aware of any definition of punitive segregation, but I [214] believe there are some further requirements—restrictions as to punitive segregation. There are some minimum standards the administration must meet. It is one of the latter pages.

Q. Showing you Defendants' Exhibit A, and directing your attention to page 23, would these be what you are referring to: The minimum standards?

(Witness indicates)

The Court: It says: "Except as otherwise provided, . . ."

". . . every inmate of the ACI in categories ABC and D or disciplinary status, excluding punitive segregation, shall be entitled . . ."

So, in other words, these minimum standards don't apply to punitive segregation.

Mr. Allen: Object.

The Court: What is the objection?

Mr. Allen: Because he says these standards don't apply. If he turns the page over, the whole page is devoted to minimum standards of confinement while in punitive segregation.

Mr. Fortunato: Right. In other words, I on 23 does not apply; II on page 24 does apply. Okay.

The Court: Let's see. What is 24, II? Where is it?

Mr. Allen: It starts at the top of the page, your Honor.

The Court: There is no II on top of the page I am looking at, page 24.

Mr. Fortunato: I am handing the exhibit up, your Honor.

[215] The Court: It is apparently a different page than I have got here. Somewhere along the line, gentlemen, I seem to have a page 24 that—

Mr. Allen: I will be glad to furnish you with—

The Court: Let's see. Wait a minute now. Maybe it appears on the previous page or else this is so fine, it didn't take. I have got it, at the top of page 24. They are spelled out there then, so there isn't any room for ambiguity—

Mr. Fortunato: Yes.

The Court: —about persons confined in punitive segregation.

Mr. Fortunato: Nothing further of this witness, your Honor.

Cross-examination by Mr. Allen

XQ. Warden, under the rules the classification board may classify a prisoner A, B, C, or D. Is that correct? A. That is correct.

The Court: Those are the categories?

Mr. Allen: Those are the categories.

XQ. In order to change the category of a prisoner, what must happen? A. He must be properly notified and appear before the classification board, have a hearing, and have a formal vote taken on downgrading his classification.

[216] XQ. That has nothing to do with—that is not the same thing or has no bearing on a disciplinary hearing,

does it? A. It has no bearing.

XQ. So that a prisoner who is classified B is not necessarily in segregation B or punitive segregation B. Those B's are two different B's, aren't they, or three different B's? A. Yes, there is much confusion.

The Court: There is much confusion?

The Witness: Yes, your Honor.

A. (Continued) And I think it comes down to the traditional years, because formerly they called punitive segregation "segregation B," but with the new set of rules that term has been eliminated and applied to a new category.

XQ. So that segregation B is actually one that— A. It is not punishment; it is a classification.

XQ. That is a classification, and punitive segregation is something that has nothing to do with classification. A. Right.

Mr. Allen: I have nothing further of this witness.

Redirect examination by Mr. Fortunato

Q. To clear this up a little bit, he is in punitive segregation right now. A. Yes.

Q. Prior to November, let's say, 11th, prior to the incident, prior [217] to all the hearings, he was in a category known as A. A. Yes.

The Court: Category A?

The Witness: Yes.

Q. If the classification board were to follow the recommendation of the disciplinary board and downgrade him, he would be put into category B.

Mr. Allen: Object; speculative.

Q. Where can you go down from A? A. To B.

Q. And if he were to be put into B, he would be confined in his cell 23 hours a day.

Mr. Allen: Object.

A. Yes.

Mr. Allen: Move to strike.

The Court: What is the basis of your motion?

Mr. Allen: The witness is testifying now as to what might happen after a disciplinary board might have found that this guy should be reclassified to B, as opposed to C or D or something else. It is wholly speculative.

The Court: Without arriving at any conclusion, it is a fact, is it not, that the board found the plaintiff guilty and ordered his confinement and made a recommendation that reclassification be considered?

Mr. Allen: Yes, your Honor, but it is our contention that [218] no matter what this Captain Baxter's board recommended to a future hearing board, procedural due process is again injected into the subsequent reclassification process. In other words, that recommendation must stand the test of yet another full set of procedural safeguards. So that whatever their recommendation, that procedural due process is fully afforded a man who is sought to be reclassified, as your Honor will see from perusing the rules.

If I may make an analogy, your Honor, it is as if the motorist were complaining that the judge, who fined him $10 or $50 for driving under the influence, was complaining and, besides, he recommended to the Registry that they suspend his license. As your Honor knows, under *Bell* and *Burson*, the Registry has to afford full procedural safeguards to a motorist before they can suspend or revoke his license, so that the judge's classification has to pass through a constitutional screen before it can have any effect.

In that sense the outcome of a future hearing before a reclassification board is wholly speculative and fully protected by constitutional due process.

Mr. Fortunato: Your Honor, I don't think anyone is more qualified than the witness to testify as to what the meaning of the sentence of the disciplinary board means and as to what effect it has within the context of the prison,

and in effect what harm or injury at least we contend as such he faces.

[219] The Court: I don't think the warden is undertaking to testify to that.

Mr. Fortunato: Excuse me?

The Court: I don't think the warden is undertaking to testify to that. We have got to the point where the board rendered a finding of guilty, imposed a sentence, there was an appeal to the warden, and the warden affirmed the decision of the disciplinary board.

Mr. Fortunato: That is correct. Now I am asking him, based upon his knowledge and expertise as warden of the prison, what happens when one is put from category A down into category B.

The Court: Put into category B by whom?

Mr. Fortunato: By the classification board.

The Court: True, but we haven't reached that point.

Mr. Fortunato: We have reached the point where we are agreed that the sentencing tribunal, so to speak, the disciplinary board, is recommending that the classification board—

The Court: —do that very thing.

Mr. Fortunato: —do that very thing: downgrade him. What else can it mean?

The Court: Are we to assume the reclassification board will follow the recommendations of the hearing board?

Mr. Fortunato: Perhaps I can clear it up by a few preliminary questions, your Honor.

[220] Mr. Allen: I think the case is now spreading beyond the limits of the complaint. There is no allegation here the classification board is going to deprive this plaintiff of procedural due process.

Mr. Fortunato: I am withdrawing my question.

The Court: Go ahead. Let's see where we go.

Q. Now directing your attention to Defendants' Exhibit A, the regulations, the Morris regulations, page 11 begins with some bold-faced type and says, "CLASSIFICATION PROCEDURES." Is that correct? A. Yes.

Q. And these are the classification procedures to be followed at the Adult Correctional Institutions? A. Yes.

Q. Following along onto page 12, sentence No. 4 says that

"The findings of the Disciplinary Board as to a particular infraction shall be conclusive."

Mr. Allen: Object.

The Court: What are you reading from?

Mr. Fortunato: No. 4 on page 12.

The Court: What is your objection?

Mr. Allen: Your Honor please, again he is asking questions which are matters of law, which are not covered by any allegation in the complaint, which were not covered on direct examination, and were not covered on cross-examination. He is opening up a [221] whole new challenge in this case. He is now asking this Court to protect him from a future classification board.

I take it there is nothing in the pleadings or in the testimony or the proof which warrants us at this late hour of the day to go into this whole line of questioning.

Mr. Fortunato: Your Honor, on cross-examination counsel went into some discussion about B and the old and the new B, and all this sort of thing. Now on redirect I am trying to clear that up.

Q. Will the disciplinary board—

Mr. Fortunato: Strike that.

Q. Will the classification board reconsider the classification of Mr. Palmigiano in light of the sentence and your upholding it?

Mr. Allen: Object. If he knows.

Q. (Continued) If you know. A. If I know?

Q. Would it be the usual procedure, that you are familiar with at the ACI, for the classification board to consider the recommendation of the disciplinary board and at least consider— A. Ordinarily they will reconsider, yes.

Q. Would they have access to any records made relative to the— A. They have access to the entire record.

Q. Of the disciplinary board? A. Right. But I should add that recommendation is not a mandate upon Classification.

[222] Q. Do you have any connection with the classification board? A. I preside over the classification board.

Mr. Fortunato: Nothing further, your Honor.

Mr. Allen: No further questions, your Honor.

The Court: You may step down, Warden.

Mr. Fortunato: Your Honor, at this time the plaintiff is through with the presentation of his case in chief.

The Court: Very well.

Mr. Fortunato: And if it is appropriate—at this time I would ask leave of the Court at the appropriate time to amend certain of my pleadings to conform to the evidence, pursuant to Rule 15 of the Federal Rules.

Specifically I refer to the fact that we have not alleged any monetary loss. And I don't believe in my request for leave I ask for the record to be expunged. But in light of the fact that the evidence before the Court at this time indicates Mr. Palmigiano suffers pecuniary loss as a result of his confinement, and, also, that the record of these proceedings will follow him to the parole board, to any other in-prison treatment in terms of going into minimum security, or anything like that, I would ask for leave to amend the pleadings to conform at the appropriate time.

Mr. Allen: This case has been answered, your Honor.

The Court: That is true, but it is the policy of the courts to permit liberality in amendments to effect justice.

[223] Mr. Allen: The State would ask for a short recess.

The Court: Very well.

Mr. Allen: Not any substantial recess. We don't anticipate any extensive—

The Court: You may have your recess without exceeding 15 minutes.

Mr. Allen: Thank you, your Honor.

The Court: We will take our customary recess at this point.

(Recess)

Mr. Allen: Your Honor will recall, this morning I tried rather clumsily to explain a sequence of events which were intended and did occur with respect to the Morris Rules becoming law. And your Honor invited me to refer the matter to my brother, Mr. Burke.

Subject to Mr. Burke making a statement on the record as to what the travel of the Morris Rules has been and the effect intended, to the extent your Honor wants to hear that, the State rests; subject to my brother, Mr. Burke's, statement on the record. And I would offer that at this time, your Honor.

The Court: I have no objection to having the benefit of the statement if you think—

Mr. Allen: I think it would be most helpful, your Honor.

The Court: Very well. It is understood by counsel that [224] the remarks of Mr. Burke don't constitute evidence, but they may serve to enlighten the Court on the history of these rules.

Mr. Allen: Your Honor, I think everything Mr. Burke is going to say is a matter of record in the court. In other words, he is describing orders and judgments and opinions that have been rendered in this court and matters of which the Court can take judicial notice, rather than matters of fact which would require to be proven in the ordinary course.

The Court: Very well; go ahead.

Mr. Burke: Your Honor, at the time of the inception of the case, *Morris* v. *Travisono,* which began in October of 1969, I was the counsel of the then Department of Social Welfare, which had within its jurisdiction the Department of Corrections. And I was one of the counsel representing the Department in that case. After protracted hearings in the case the rules and regulations governing disciplinary, classification, and mail procedures for all inmates at the Adult Correctional Institutions were drafted by counsel both for the petitioners and for the State of Rhode Island, and a consent decree was entered by Judge Pettine promulgating these rules. Notice was given to all members of the class who had brought the suit as to the rules, and hearings were held by Judge Pettine at which an opportunity was given to inmates to express their views. In any event these rules were finally promulgated as a decree of the court in that case.

[225] The Court: You mean these rules are incorporated by reference in an order?

Mr. Burke: Yes, they are, your Honor; they are.

However, there was a period of time, your Honor, when I went on to the Department of Mental Health, Retardation, and Hospitals, so I cannot testify firsthand as to what happened over a year and a half. But as of July 1st of this year a new Department of Corrections was established within the State of Rhode Island, and I was appointed as the legal counsel of the Department of Corrections. Judge Pettine had indicated—and indicated by opinions and by orders—that it was not the desire of the Federal Court to maintain permanent jurisdiction over the rules and regulations, but that the rules and regulations should be incorporated into the laws of the State of Rhode Island.

The Court: Incorporated into the laws of the State of Rhode Island?

Mr. Burke: Of the State of Rhode Island. In other words, they should be promulgated as a regulation of the State of Rhode Island in accordance with the Administrative Procedures Act of the State of Rhode Island.

As a result of this, in compliance with the Administrative Procedures Act, public advertisements were placed in the Providence Journal and Evening Bulletin. The proposed rules and regulations, which were identical with the decreed rules and [226] regulations, were placed on file in the office of the Secretary of State.

Within the prescribed period of time some 28 or 29 inmates of the Adult Correctional Institutions requested, as they can under Rhode Island law, that a public hearing be held in relation to the rules and regulations. In compliance with this request two public hearings were held; one open to the general public and inmates of the minimum-maximum, minimum-medium security building on—I believe it was August the 10th of this year, and a transcript was made of those proceedings. And another hearing was held on August 15th in the maximum security building of the Adult Correctional Institutions where the rules and regulations were discussed line by line and where witnesses were allowed to testify, including, as I distinctly recall, Mr. Palmigiano, who did testify and express some objection to certain of the rules.

A copy of the transcript of the hearing was forwarded to the National Prisoners Rights Association at their request, and on October the 10th the director of the Department, Mr. Travisono, having reviewed the transcript, notified the Secretary of State and forwarded a copy of the rules, identical with the copy that you have, that has been admitted in evidence in this case as, I believe, Defendants' Exhibit A, to the Secretary of State, for filing as the rules of the Department.

[227] Under the state law there is a 30-day period thereafter in which any interested party can ask for a concise statement as to why a specific rule has been adopted. There were no such requests.

The Court: When were these actually filed?

Mr. Burke: They were filed on the 10th of October, your Honor,—

The Court: Of this year?

Mr. Burke: Of this year. —as the rules of the Department under the Administrative Procedures Act. That was in final form. They had originally gone up there earlier in the year. Then the notice proceeding went through. But having had the hearings, the Secretary of State was officially notified on the 10th of October that the rules were adopted as the rules of the Department of Corrections governing disciplinary, classification, and mail procedures for all inmates at the Adult Correctional Institutions. Then within the Administrative Procedures Act there is a 30-day period in which any interested person may inquire of the Department as to why a specific rule was adopted. That 30-day period expired on 10 or 11 November. And I have, subsequent to that date,—I believe it was last week —notified Judge Pettine and counsel of record that the rules have been promulgated in accordance with—I notified them by letter that the rules have been promulgated in accordance with the Administrative Procedures Act.

[228] The Court: Your point being then that the rules were in full force and effect on November 11th.

Mr. Burke: Yes, your Honor.

The Court: Is there any dispute about that, Mr. Fortunato?

Mr. Fortunato: I have no way of disputing it, but I would certainly say that Mr. Burke, as an officer of the court, has put forth everything he believes to be correct.

The Court: In other words, the rules and regulations were in effect on November 11, 1972?

Mr. Fortunato: Yes, your Honor.

The Court: And the disciplinary proceedings were to be governed and conducted by and in accordance with those rules.

Mr. Fortunato: Yes, your Honor.

The Court: Very well.

You say that the defendants rest?

Mr. Allen: We rest, your Honor.

The Court: Very well. Are you prepared to argue today or would you prefer to argue on Friday?

Mr. Allen: I would frankly prefer to argue on Friday, your Honor, but—

The Court: If you do, I think it might be well. I want counsel for both sides to direct your inquiry and contentions, among other things, to whether or not there was in fact a compliance by the disciplinary board and authorities at the ACI with the provisions of these rules and regulations.

[229] Mr. Allen: Yes, your Honor.

Mr. Fortunato: Your Honor,—

The Court: Excuse me. It can't be Friday.

Mr. Fortunato: Your Honor, I can represent that as far as the plaintiff is concerned, I am prepared to address myself to that problem as well as—

The Court: We have a jury trial on Monday, Mr. Clerk?

Mr. Fortunato: If counsel is ready, and recognizing—

Mr. Allen: I don't have that much to say, your Honor.

The Court: Perhaps we had better proceed because we will have no session of the court on Friday. Tomorrow is a holiday. We certainly will have no session tomorrow.

Mr. Allen: If I might have just a moment, your Honor, to shuffle—

The Court: Take your time. We don't mean to hurry you or deny you an opportunity to be heard.

Mr. Fortunato: Your Honor please, I understand the Court's practice is to not go past 4:30. Shall we divide the time equally then?

The Court: I think you should.

Mr. Allen: I shan't require that long, I don't think.

(Arguments of counsel)

The Court: The Court will adjourn.

(Adjourned at 4:45 p.m.)

I hereby certify that the foregoing 229 pages are a true and accurate transcript according to my stenographic notes.

(s) Eunice J. Archambault
Official court reporter.

District Court of the United States
For the District of Rhode Island

Civil Action No. 5053
Nicholas A. Palmigiano
v.
Joseph Baxter Et Al.

OPINION
December 15, 1972

Day, District Judge. In this action the plaintiff seeks a declaratory judgment, injunctive relief and damages against the defendants. The jurisdiction of this Court is invoked under the provisions of 4 U.S.C. § 1983 and 28 U.S.C. § 1343.

Plaintiff is a prisoner confined in the Rhode Island Correctional Institutions, at Howard, Rhode Island, and is serving a life sentence for murder imposed upon him on September 14, 1970. He is the President of the National

Prisoners Reform Association which by permission of the state authorities has a local office in said Institutions' facilities. The defendants, Captain Joseph Baxter, Norman Carney and Mitchell Siner, are correctional officers in said Institutions, and the defendants Francis Howard and Roland P. Remillard are, respectively, the Warden and Deputy Warden thereof.

In a lengthy complaint, a summary of which would unduly and needlessly extend this opinion, the plaintiff alleges in substance that on or about November 11, 1972, he was charged with a violation of prison discipline, specifically, "inciting a disturbance and disruption of A.C.I. operations, which might have resulted in a riot . . ."; that on November 13, 1972, the defendants Baxter, Carney and Siner, sitting as a disciplinary hearing board, summoned plaintiff to appear before them to answer to said charge; that he appeared before them with his attorney, Stephen J. Fortunato, Esq.; that he was advised by them that his attorney would not be permitted to represent him during said hearing, and that he, the plaintiff, remained mute: that said defendants, sitting as said Disciplinary Board, did not hear or consider any evidence for or against him and found him guilty of said charge and sentenced him to thirty (30) days in the Behavioral Correctional Unit (segregation), and recommended that he be down-graded in classification at the end of such sentence, and that he lose any and all good time credits, all in violation of his constitutional rights.

He seeks a declaratory judgment —

(1) that the action of the members of said Board, in refusing him the assistance of counsel during said hearing, was in derogation of his constitutional rights under the Fifth, Sixth and Fourteenth Amendment rights,

(2) that its decision was null and void on the ground that no evidence was produced against him,
(3) that the procedure followed by said Board, namely, the drawing of adverse inferences from his refusal to make any statements to be in derogation of the Fifth and Fourteenth Amendments to the United States Constitution, and
(4) that the convening of any disciplinary hearing, based upon facts from which a criminal prosecution could be brought, is unconstitutional unless and until any criminal charge is disposed or until the plaintiff is guaranteed by appropriate officials that no criminal charge will be placed against him arising out of any incidents that also constitute an alleged violation of prison regulations.

Plaintiff also seeks a permanent injunction enjoining the defendants from convening a disciplinary hearing and from punishing the plaintiff until the plaintiff is assured that no criminal charge will be brought against him arising out of said incident that occurred on November 11, 1972.

Additionally, he seeks an order directing the defendants "to expunge from the plaintiff's record all findings, decisions, and descriptions of any kind pertaining to the events and happenings complained of herein", and an award of compensatory damages of One Hunderd Dollars ($100) for every day he has spent in punitive segregation, the costs of this proceeding, plus a reasonable attorney's fees.

The testimony and evidence presented during the trial of this action establish the foilowing facts. During the early evening of November 11, 1972, another prisoner, confined in the same wing of said Institutions as the plaintiff, became violently ill; efforts by the guards to provide medical attention for him had proved unsuccessful up to 8:50 o'clock P.M. when plaintiff was observed urging other

prisoners not to return to their cells at 9:00 o'clock P.M., when the buzzer sounded, as required by the regulations, in protest against the failure to provide such medical attention. Some of the prisoners responded to his urgings and did not return to their cells until 9:10 o'clock P.M. when such medical attention was provided.

The evidence further shows that Lutehr Gorton, a guard, who had observed plaintiff's activities, decided that he should report plaintiff's misconduct to his superior, Captain Brule. Before preparing his report to his superior, he went to the plaintiff's cell and advised him that he was going to report his violation of regulations to Captain Brule. He then prepared and submitted to Captain Brule such a report charging the plaintiff with infraction of the Rules, to wit, "Inciting a disturbance and disruption of A.C.I. operations which might have resulted in a riot. At 8:50 P.M., and from then until about 9:05 P.M., I saw, and heard inmate Palmigiano going among the other inmates and telling them not to go to the cells, when the buzzer sounds at 9: P.M."

After receipt of said report Captain Brule went to plaintiff's cell and read to the plaintiff said report. After his interview with the plaintiff, Captain Brule prepared his investigative report which reads as follows:

"November 11, 1972. Superior's Investigation. Inmate denies infraction as written: he says the reason he came to the Rear Hall to see me was that I had been informed by other inmates earlier in the evening of an inmate, James Madden, being sick and that I had taken no action by 8:45 P.M. He says the reason no one went to their cells was that I had not and would not do my job until pressured. Inmate Palmigiano says he is not sorry and would take similar action again if necessary.

Inmate Palmigiano was informed to contact his lawyer as he may be prosecuted for a violation of state law.

Inmate Palmigiano Tagged and Fed-in. He definitely appears to be a threat to the security and order of the Institutions."

The evidence further establishes that copies of said disciplinary report and said investigative report were delivered the next morning to Robert Flint of said National Prisoners Reform Association to which by agreement with Warden Howard all reports of infractions of the rules and regulations by inmates were to be referred. Under the regulations governing disciplinary procedures in effect on November 11, 1972, the Morris rules so-called,[1] any inmate had the right to be assisted at a disciplinary hearing by a classification officer or any other individual authorized by the Warden and Assistant Director for Correctional Services. Prior to November 11, 1972, the said Robert Flint had been authorized to assist inmates at such disciplinary hearings.

Plaintiff testified that on November 12, 1972, Robert Flint, to whom copies of said disciplinary and investigative reports had been given, showed them to him. He stated that on said date he conferred with his personal attorney and several other attorneys, having been advised that he would be granted a hearing on the infractions charged to him on the afternoon of November 13, 1972.

Said hearing was held in the office of Deputy Warden Remillard, convening at approximately 2:15 o'clock P.M. on November 13, 1972. At the request of the plaintiff and as permitted by said regulations, a tape recording of what transpired thereat was made by Robert Flint and at the completion of said hearing was delivered by him to Mr. Siner. The testimony of the plaintiff and Captain Bax-

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[1] These rules were approved in *Morris* v. *Travisono*, 310 F. Supp. 857 (D.C. R.I. 1970) and were promulgated by the Assistant Director For Correctional Services of the State of Rhode Island on February 9, 1970.

ter and the contents of said tape recording establish beyond a reasonable doubt what transpired at said hearing. At the outset thereof plaintiff entered said hearing room with his attorney who stated that he was there to represent the plaintiff during said hearing on the charge of infraction of the rules which had been made against him. He was advised by Captain Baxter that, under said rules and regulations, an inmate charged with an infraction thereof was not permitted to be represented by counsel at a disciplinary hearing. Plaintiff's counsel strongly protested this ruling and then he and plaintiff left said hearing room. Shortly thereafter plaintiff and Robert Flint returned to said hearing room. The taped record of said hearing recites that Captain Baxter then read to the plaintiff said disciplinary report and the investigative report of Captain Brule. He then addressed the plaintiff as follows: "What happened here, Nick?" Before any reply was made by the plaintiff, Robert Flint addressed said Board protesting that the plaintiff was entitled to be represented by his counsel during said hearing. Plaintiff then replied to the inquiry of Captain Baxter by stating: "At this time I have to take my attorney's advice and remain mute. I would also reask if my attorney could be present." Captain Baxter then replied: "Disciplinary boards are disciplinary boards. They are not court (?) of law. You have been offered a postponement. You have refused it. We do not have as an institutional policy attorneys sitting in on disciplinary hearings. Your request is denied." Flint then reiterated his and plaintiff's objection to proceeding with said hearing without the plaintiff being represented by counsel. Captain Baxter then again denied the request of the plaintiff that he be permitted representation by his attorney during said hearing. After this ruling, he addressed the plaintiff as follows: "Do you intend to answer any questions for the Board?" The latter's reply was "No".

The record further shows that plaintiff and Flint, at the request of said Board, then left the hearing room. Approximately five (5) minutes later they re-entered said room at the request of said Board. Captain Baxter then read the decision of said Board which was as follows:

> "The Board finds the defendant guilty. He stood mute and did not call any witnesses. The Board has no alternative but to go on the disciplinary report — what is written on the disciplinary report. The sentence is 30 days' segregation B, 30 days' loss of good time; the Board recommends that Nick Palmigiano be seen by the classification board for possible down grading."

He then asked the plaintiff if he wished to appeal said sentence. Flint replied as follows: "We do appeal the entire action of this Board today; most strongly object to the Board's deliberations and this disciplinary action — alleged disciplinary action being taken, most strenuously voice objection to it. And we do appeal to any existing authorities within the State of Rhode Island insofar as the action of this Board is concerned today."

The record in this action shows that said appeal was noted and that said Board's findings and decision were forwarded on November 13, 1972 to the defendant Warden Howard for review in accordance with said rules and regulations. After a review of said records and an interview with the plaintiff on November 14, 1972, Warden Howard denied said appeal and the plaintiff was then committed to said Behavioral Correctional Unit to serve said sentence.

Plaintiff, during his testimony before this Court, testified that he was familiar with said Morris Rules, so-called, and that he objected to some of them at the time of their approval. He also admitted that he did not request that any witnesses be called before said Board to testify in his

behalf, although he knew that he had such a right under said rules. During his testimony he did not state or claim that he was innocent of the charge that had been preferred against him and of which said Disciplinary Board had found him to be guilty.

It is well settled that in a disciplinary procedure, such as that involved herein, typical trial procedures employed in a criminal trial are not required. On the other hand, prison officials may not be arbitrary or capricious in imposing punishment upon inmates for violations of prison rules and regulations governing their conduct while incarcerated. Disciplinary action must be premised upon facts rationally determined. *United States Ex Rel Walker* v. *Mancusi*, 467 F.2d 51 (2d Cir. 1972); *Tyree* v. *Fitzpatrick*, 325 F. Supp. 554 (D.C. Mass. 1971), *affirmed* 445 F.2d 627 (1 Cir. 1971); *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom. Sostre* v. *Oswald*, 404 U.S. 1049 (1972); *Nolan* v. *Scafati*, 430 F.2d 548 (1 Cir. 1970); *Brenneman* v. *Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972); *Mertz* v. *Pinto*, 343 F. Supp. 374 (D.C. N.J. 1971); *Urbano* v. *McCorkle*, 334 F. Supp. 161 (D.C. N.J. 1971).

In *Sostre* v. *McGinnis, supra*, the Court of Appeals said at Page 198:

> ". . . In rejecting Judge Motley's conclusions, however, we are not to be understood as disapproving the judgment of many courts that our constitutional scheme does not contemplate that society may commit lawbreakers to the capricious and arbitrary actions of prison officials. If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, see Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950), and afforded a reasonable opportunity to explain his actions."

Similarly, in *Nolan* v. *Scafati, supra*, the Court of Appeals said at page 550:

> ". . . While the procedural safeguards provided citizens charged with a crime obviously cannot be provided to prisoners charged with violation of a disciplinary rule, some assurances of elemental fairness are essential when substantial individual interests are at stake."

It is well settled that in a hearing before disciplinary boards procedural due process does not require that a prisoner be permitted to be represented by counsel during such hearing. *Sostre* v. *McGinnis, supra; Braxton* v. *Carlson*, 340 F. Supp. 999 (N.D. Pa. 1972); *Urbano* v. *McCorkle, supra; Nolan* v. *Scafati*, 306 F. Supp. 1 (D.C. Mass. 1969).

The evidence in this action establishes beyond any doubt that the plaintiff discussed the charge filed against him with his legal counsel prior to said hearing and that he was, in fact, represented during said hearing by the said Robert Flint, although the plaintiff testified to the contrary.

After a careful consideration of all of the evidence and the reasonable inferences to be drawn from it, I am satisfied that procedural due process was accorded to the plaintiff in said disciplinary proceeding. He was fully advised prior to said hearing of the infraction of the rules by being shown copies of said disciplinary report and said investigative report by Robert Flint to whom they had been delivered on November 12, 1972. He then conferred with

his legal counsel with respect thereto. At the opening of said hearing on November 13, 1972, the contents of said reports were read verbatim to him and he was given the opportunity to explain his actions as narrated therein. He rejected this opportunity by stating that he intended to remain mute and that he would not answer any questions addressed to him by said Board. This was a deliberate decision made by him after being confronted with the accusation made against him, and after having been informed of the evidence against him.

Finding, as I do, that the plaintiff was accorded procedural due process by said Disciplinary Board and that its decision was based on facts rationally determined, it follows that the plaintiff is not entitled to the injunctive and other relief which he seeks in this action. Accordingly, judgment will be entered for the defendants.

(s) Edward W. Day
District Judge

United States District Court
For the District of Rhode Island

C.A. No. 5053

Nicholas A. Palmigiano
v.
Joseph Baxter, et al.

JUDGMENT

This matter came on for hearing on preliminary injunction, and by agreement of the parties the hearing consolidated with the hearing on the merits. After the taking of testimony, argument of counsel and consideration thereof I find:

(1) That the defendants premised the discipline imposed on plaintiff upon substantial facts rationally determined;

(2) That plaintiff did not state or claim before this court that he was innocent of the charges of which the disciplinary board found him guilty;

(3) That procedural due process was accorded the plaintiff in the disciplinary proceeding;

(4) That plaintiff waived his opportunity to explain his actions to the disciplinary board.

I conclude:

(a) That the defendants did not deny the plaintiff of any of the rights as alleged in the complaint.

(b) That plaintiff was not entitled either under the Morris rules or otherwise to be represented before the disciplinary board by an attorney at law.

Wherefore, it is

Ordered, Adjudged and Decreed

that plaintiffs demand for injunctive relief is denied. Further, plaintiffs prayers to expunge and for damages are denied; judgment for defendants on all prayers for relief.

Dated at Providence this 27th day of December, 1972.

Enter:

(s) Edward W. Day
United States District Judge

December 27, 1972

United States District Court
For the District of Rhode Island

[Title Omitted in Printing]

PLAINTIFF'S MOTION FOR RECONSIDERATION

The Plaintiff hereby moves the Court pursuant to Rule 59 of the Federal Rules of Civil Procedure to reconsider its decision and alter or amend judgment in the above-entitled case, rendered on December 15, 1972. Specifically, the

plaintiff requests the Court to reconsider the following issues:

1. Whether by interrogating the plaintiff at the disciplinary hearing in question and penalizing him for his failure to testify where he had been informed that he may be prosecuted under state law for the same charge and had not been assured that his testimony could not be used to incriminate him, the defendants deprived the plaintiff of his rights under the Fifth and Fourteenth Amendments to the United States Constitution;

2. Whether by failing to permit the plaintiff to be represented by an attorney at his disciplinary hearing where he was interrogated by the defendants, penalized/for his failure to testify; and where he had been previously informed that he may be prosecuted under state law for the same charge but had not been assured that his testimony could not be used to incriminate him in a state criminal proceeding, the defendants deprived the plaintiff of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Wherefore plaintiff prays that the Court reconsider its decision of December 15, 1972 and alter or amend judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure in light of the above-stated issues or in the alternative rule that these issues have not been adjudicated in this case.

Respectfully submitted,
(s) Ellen Wilbur Katz
Ellen Wilbur Katz
National Prisoners'
Reform Association
135 Dodge Street
Providence, Rhode Island

[Certificate of Service Omitted in Printing]

To: W. Slater Allen, Esquire
Attorney for Defendants
250 Benefit Street
Providence, Rhode Island

Please take notice, that the undersigned will bring on the within motion for hearing before this Court, United States District Court, Federal Building, Providence, Rhode Island on the fifteenth day of January, 1973, at 10 o'clock a.m. of that day or as soon thereafter as counsel can be heard.

(s) Ellen Wilbur Katz
Ellen Wilbur Katz
Attorney for Plaintiff
National Prisoners' Reform Assoc.
135 Dodge Street
Providence, Rhode Island 02907

United States District Court
For the District of Rhode Island

Nicholas A. Palmigiano
v.
Joseph Baxter, et al.

OPINION
January 19, 1973

Day, *District Judge*. In this action the plaintiff now seeks a reconsideration by me of the conclusions set forth in my opinion filed in this action on December 15, 1973, and the amendment of the judgment entered in accordance therewith on December 27, 1972.

In my opinion said motion for reconsideration and amendment presents no valid grounds for the relief sought therein. The authorities upon which the plaintiff relies in sup-

port of his motion are clearly distinguishable on their facts from this case. Accordingly, said motion must be and it is denied.

(s) Edward W. Day
District Judge

United States District Court
For the District of Rhode Island

[Title Omitted in Printing]

ORDER

This matter came on to be heard on plaintiff's motion requesting the court to reconsider its conclusions of law in a prior opinion and judgment. After consideration thereof, I conclude that plaintiff's motion presents no valid grounds for relief and it is

Ordered

plaintiff's motion is denied.

Dated at Providence this 26 day of January, 1973.

Enter:

(s) Edward W. Day
United States District Judge

United States District Court
For the District of Rhode Island

[Title Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that Nicholas A. Palmigiano, plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit from the final judg-

ment entered in this action on the 27 day of December 1972, and from order entered on the 26 day of January, 1973, denying plaintiff's Motion to Reconsider and Alter or Amend Judgment.

(s) Ellen Wilbur Katz
Ellen Wilbur Katz
Attorney for
Nicholas A. Palmigiano
135 Dodge Street
Providence, Rhode Island

Copy to: 1. Deputy Warden 2. Inmate

ADULT CORRECTIONAL INSTITUTIONS

DATE 11/13/72 INMATE DISCIPLINARY REPORT

Date Nov. 11, 1972

Time of infraction 8:50 P.M.

Inmate's Name Nicholas Palmigiano D.O.B. May 30 1923

Quarters Assignment G-8 Work Assignment Barber Shop

Infraction of Rules by Inmate: (Give a Detailed Account) inciting a disturbance and disrupt of ACI operations, which might have resulted in a riot, at 8:50 P.M. , and from then until about 9:05 P.M., I saw, and heard inmate Palmigiano going among the other inmates and telling them not to go to the cells, when the buzzer sounds at 9:00 P.M.

Inmate's Attitude: Poor and demanding

What Course of Action Was Taken Immediately Following Infraction? Notified Capt. Brule

Reporting Officer's Signature

Was Inmate Forewarned Before Disciplinary Action Was Taken? Yes, by Capt. Brule.

Did Other Institutional Personnel Witness The Infraction? (Give Names) No

Did Superior Officer Orally Inform Inmate of Infraction? Yes Capt. Brule

Superior Officer's Investigation: ~~(see attached reports)~~

Superior Officer's Signature

DISPOSITION OF CASE BY DISCIPLINARY BOARD

Counselor's Name [illegible] Date 13 Nov 72

[illegible]

ACI-47

BEST COPY AVAILABLE

November 11, 1972

Superior's investigation

Inmate denies infraction as written, he says the reason he came to the Rear Hall to see me was that I had been informed by other inmates earlier in the evening of an inmate, James Madden, being sick and that I had taken no action by 8:45 P.M. He says the reason no one went to their cells was that I had not and would not do my job, until pressured. Inmate Palmigiano says he is not sorry and would take similar action again if necessary.

Inmate Palmigiano was informed to contact his lawyer as he may be prosecuted for a violation of state law.

Inmate Palmigiano ordered Tagged and Fed-in. He definitely appears to be a threat to the security and order of the Institution.

(s) Ronald R. Brule
Capt. Ronald Brule

STATE OF RHODE ISLAND
INTER-DEPARTMENTAL COMMUNICATION

Nov. 11, 1972

To: Roland Remillard, Deputy Warden
Dept.: Maximum Security
From: Capt. Ronald Brule
Dept.: Maximum Security
Subject: Refusal of inmates to go to cells for 9:00 P.M. count.

Sir,

At approximately 8:20 P.M. on the above date, Officer Gorton called and informed me that inmate James Madden appeared to be sick in his cell. I immediately went in and saw Madden bent over on his bed complaining of pains in his abdomen and right side. He also said that he felt like vomiting but that nothing came up. He had the same symptoms approximately two weeks earlier, when he was admitted for tests at the R.I.M.C.

At 8:25 P.M. I called the Supervisor of Nurses at 'H' Bldg. and explained the situation. She told me she would contact the doctor and return my call.

At 8:30, inmate Alfredo Pelleccia came to the Rear Hall and told me I had better get Madden to a doctor, "he might be having a heart attack". I told inmate Pelleccia that I had already called the R.I.M.C. and the doctor was going to call me back. He then demanded that I not wait for the doctor's call and that I send the man to the Medical Center immediately.

At approximately 8:45 P.M. inmate Nicholas Palmigiano came to the Rear Hall door and also demanded that I immediately take Madden to the hospital. I told inmate Palmigiano that I was still waiting for the doctor. He again demanded that I call the Warden and to take the man to R.I. Hospital.

At 8:50, inmate Palmigiano again came to the Rear Hall door and said that the population was not going to go to their cells unless I took Madden to the hospital. I again told inmate Palmigiano that I was doing everything possible for Madden. I also checked inmate Madden again and told him what was being done for him. I then informed you of the situation, and told Officer Bonn to call Lt. Detonnancourt and inform him. Officer Bonn tried but couldn't reach him at 9:00 P.M. due to the lockup going on in the Lower South Area.

At 9:00 p.m. the inmates of GHI and JFL Blocks, refused to go to their cells. I again told inmate Palmigiano I was doing everything possible for inmate Madden and that refusing to go to cells was very serious.

Shortly thereafter Lt. Detonnancourt came to the rear hall and said we should get Madden out of his cell immediately due to the situation. I again went to Madden's cell and was told by inmates there that Madden was spitting blood. Officer Bonn and I brought Madden to the Rear Hall and again called the Nursing Supervisor who told me that the Doctor had just arrived and to send the inmate to the H Bldg. clinic which I did immediately which was approximately 9:10 P.M.

At 9:15 P.M. all the protesting inmates were in their cells. At 9:30 P.M. Officer Fagnant called from H bldg. and informed me that the doctor had said that there was nothing physically wrong with inmate Madden. Upon his return from the R.I.M.C., I placed Madden in hosp. N 4 for observation on request of the Doctor.

Respectfully,
(s) RONALD BRULE
RONALD BRULE, Capt.

STATE OF RHODE ISLAND
INTER-DEPARTMENTAL COMMUNICATION

November 11, 1972

To: Ronald R. Brule, Captain
Dept.: Maximum Custody
From: James Gould, Corr. Officer
Dept.: Maximum Security
Subject:

At approximately 8:50 p.m. on this date, I observed inmate Alfredo Pelleccia going around informing inmates that they were not to go into their cells at the 9:00 p.m. lock-up, until inmate James Madden was taken to the hospital. At 9:00 p.m. when the buzzer sounded for the lock-up, many inmates didn't go into their cells.

(s) JAMES R. GOULD
JAMES R. GOULD, Corr. Officer

DISCIPLINARY PROCEDURES*

PROCEDURAL OUTLINE FOR DISCIPLINARY ACTION

Five Mandatory Steps:

1. Written charge by reporting officer or employee
2. Investigation and review by superior officer
3. Hearing before Disciplinary Board
4. Administrative review
5. Record

I. CHARGE BY REPORTING OFFICER OR EMPLOYEE

A. An officer or employee observing minor violations should handle such incident tactfully and firmly by warning and counseling.

1. If the officer or employee considers the imposition of discipline necessary for a minor offense, he may at his discretion present the inmate with the option of a written charge and subsequent appearance before a Disciplinary Board, or administrative loss of institutional privileges for a period of up to two nights.

(a) The charge and choice of disposition must be presented to the inmate with dispatch.

(b) The inmate must execute a signed waiver of his right to appear before the Disciplinary Board.

(c) If such waiver is obtained, the administrative penalty must commence immediately.

(d) Records of all such two night losses of institutional privileges shall be maintained for one calendar year, then shall be destroyed.

(e) The inmate shall be given a copy of any waiver of a right to the Disciplinary Hearing he executes and records of any punishment resulting therefrom.

(f) Refusal by an inmate to waive his rights to

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* NOTE: The entire text of the "Morris Rules" is set out in *Morris* v. *Travisono*, 310 F. Supp. 857, 865-75 (D.R.I. 1970).

be granted a Disciplinary Hearing can in no way be held against him. Following demand for a Disciplinary Hearing on a minor violation, the inmate may not be confined to his cell pending said hearing as a threat to the order or safety of the institution. If the inmate is subsequently found guilty by the Disciplinary Board, punishment may not be imposed beyond the two night loss of institutional privileges, unless additional sufficient rationale is found by the Disciplinary Board.

2. The inmate may be presented the aforementioned choice of loss of institutional privileges only once during each calendar week. The written notice of choice shall inform the inmate that additional minor violations during that period shall require a Disciplinary Hearing.

3. A written copy of the charge, or if waiver is obtained, the signed waiver, shall be transmitted with dispatch by the correctional officer to the superior officer on duty at the time. Upon receipt of same, the superior officer may, if he considers the violation too minor to warrant imposition of discipline, dismiss the charges and/or release the inmate from confinement in his cell.

B. When an employee or officer considers a written charge and full disciplinary procedures necessary for proper discipline and control, he must show in writing on an inmate violation report form: inmate's name, housing work assignment, if applicable; time, date, place and charge; give known details concerning the alleged violation, and sign the report.

C. An officer may take immediate custody of an inmate being charged with a disciplinary infraction, if such action is deemed by the officer to be necessary to avoid assault or serious disorder. However, only a superior officer may determine that an inmate should be held pending further investigation or hearing by a disciplinary board. Such

detention should take place only when it appears that the inmate represents a threat to himself, to others, or to the security or order of the institution. The superior officer determining that detention prior to an investigation and hearing is necessary must make a written report, and his decision is subject to review by the Warden, Assistant Warden or Deputy Warden as soon as possible. Such detention should only last as long as the circumstances requiring it remain in effect and in no event should an inmate be detained without a hearing beyond the next meeting of the disciplinary board. If an inmate is locked up pending an investigation and disciplinary hearing, such detention must not be in the punitive segregation area unless the security or safety of the institution so requires.

II. Investigation by a Superior Officer

A. The reporting officer or employee must submit a written report of a charge to a superior officer as soon as possible after the alleged violation occurs.

B. A superior officer shall with dispatch and under any circumstances no later than one day after filing the charge, orally inform the inmate of the charge against him.

C. The superior officer shall conduct a preliminary investigation of the matter without unnecessary delay. The investigation will include interviews with the reporting employee, the inmate charged and any other employee or inmates indicated.

D. The superior officer shall make a written summary of his investigation including the results of his interviews and a notation of notice to the inmate. He shall sign and submit the full report to the Deputy Warden of the facility in which the infraction occurs. A copy of the disciplinary report filed by the superior officer should be given to the inmate prior to any disciplinary hearing together with the notice required in subsection F *infra*.

E. The Deputy Warden may either dismiss the charge or transmit notice of the hearing to the senior classification counselor, who shall in turn assign responsibility for the notice and subsequent procedures to a classification counselor. Said notice shall be timely and shall include the date and time of the hearing, the charge, including institutional rule violated, reference to the time, place and other persons involved, if any; and the notice of the right to assistance by a classification officer, and the right to appeal to the Warden or Acting Warden any unfavorable disposition by the disciplinary board.

F. The assigned classification officer will provide the inmate with a copy of the notice he has received concerning the hearing Notice of the hearing must be transmitted to the inmate in a sufficient period of time prior to the hearing to give the inmate an opportunity to prepare a defense.

G. Any inmate being charged shall have the right to be assisted at the disciplinary hearing by a classification officer or any other individual authorized by the Warden and Assistant Director for Correctional Services. The inmate shall be informed of this right as part of the notice provided of the hearing itself.

H. Only a duly authorized Disciplinary Board has power to issue punishment to inmates, including those in the Behavioral Correctional Unit, except as indicated in Section I, paragraph A(1) above.

I. Whenever an inmate is charged with an institutional violation which may be the subject of criminal prosecution, the written notice referred to in paragraphs E and F above shall so notify the inmate, and advise him that although statements he makes in his defense at a disciplinary hearing are probably not admissible for affirmative use by the prosecution at a trial, he may wish to consult an attorney to determine what action to take.

III. The Hearing Before the Disciplinary Board.

A. The Disciplinary Board shall consist of three members, The Deputy Warden or, in his absence, a Superior Officer of the facility in which the alleged infraction occurred shall be the chairman. The two remaining members shall be personnel from the custody and treatment departments respectively. The disciplinary board shall meet at least twice during each calendar week, at least three days apart.

B. Any officer or employee who initiates a violation report or who investigates and reviews the initiating officer's report is not eligible to sit on the Disciplinary Board to hear that case.

C. The hearing shall be conducted in the following manner:

1. The circumstances of the charge will be read and fully explained by the Chairman of the Board.

2. The inmate shall admit or deny the charges.

3. The board members may interrogate the inmate and others as necessary. All interrogation will take place in the presence of the inmate, except where the Board determines that an informant's identity must be protected. In those cases the Board shall make such a determination in the record and indicate the nature of the informant's testimony.

4. If the inmate thinks the charge against him is untrue (in whole or in part), he may present information available to him and others. Said presentation shall include the right to call a reasonable number of witnesses, both diverse and favorable and examine said witnesses.

5. If the inmate has requested the assistance of a classification counselor or other individual approved by the Warden and Assistant Director for Correctional Services, said person shall assist him in the presentation of the case.

6. Upon completion of the hearing, the Disciplinary Board shall take the matter under advisement.

7. After decision is reached by the Board, the inmate shall be called before the Board to hear the decision and to be advised of its rationale and consequences.

8. A board decision must be based upon substantial evidence.

9. In the event of an unfavorable disposition, the inmate will be informed of his right to appeal the decision of the Disciplinary Board to the Warden or Acting Warden. It is to be made clear to the inmate that with respect to any appeal he may request assistance from his classification counselor or other individuals approved by the Warden and Assistant Director for Correctional Services in framing what he believes is wrong with the decision. The inmate shall be allowed to have his objection, if any, incorporated in the case record submitted for review.

10. Any inmate appearing before a disciplinary board may upon request have a recording made of the hearing provided that the equipment for said recording must be furnished by the inmate and that said recordings are to be impounded except for purposes of administrative or judicial review.

Actions Taken by a Disciplinary Board may be as follows:

1. Dismissal of charge
2. Reprimand
3. Recommendations to classification board for change of status.
4. Temporary loss of specified privileges within inmate classification not to exceed thirty days.
5. One to thirty days placement in punitive segregation.
6. 5 above plus referral to classification board with recommendation of reclassification.

7. Loss of good time as prescribed by law under §13-2-44 of the General Laws.
8. Any combination of 3 through 7 above and/or suspended action on any or all of 3 through 7 above.

IV. Review

A. Within three days of the Disciplinary Board decision (Sundays and holidays excluded) if an inmate requests an appeal of a decision of the disciplinary board, the record of any proceedings shall be forwarded to the Warden or Acting Warden. This review shall be completed and the inmate notified of the decision on review within one week. Disposition shall be suspended during this period.

B. If the Warden or Acting Warden is in agreement with the Disciplinary Board decision, the decision is approved and ordered.

C. If the Warden or Acting Warden does not agree with the Disciplinary Board decision, he may order further proceedings or he may reduce or suspend any result of a Disciplinary Board hearing unfavorable to the inmate.

D. The inmate will be notified of any change resulting from the review process.

Whenever individuals are named in their position of authority, it is permissible in their absence for their lawful substitutes to replace them.

V. The Disciplinary Record.

A. A record shall be maintained of all disciplinary proceedings including review by the Warden or Acting Warden.

B. The disciplinary record shall include:

1. A summary of all information produced at the hearing including:

(a) testimony of all witnesses

(b) the written summary investigation report referred to in II(D) above.

(c) The nature of the testimony of any unidentified informant.

2. Physical evidence viewed.

3. Findings of fact and the supporting reasons for the disposition decided upon.

4. Rationale for change in disposition upon review by Warden or Acting Warden.

C. A complete record of all disciplinary proceedings shall be maintained in the inmate's permanent file. If the right to be granted a hearing for a minor violation is exercised, the disciplinary record must indicate: (1) that the option of loss of institutional privileges for one of two nights has been tendered and refused; (2) if disposition in excess of the aforementioned two days period is meted out, the supporting explanation must be included on the record. If the right to a Disciplinary Hearing is waived, the violation shall in no way appear on the inmate's record or upon any record placed before the Parole Board or Classification Board. Records of all such minor violations for which the right to a Disciplinary Hearing is waived shall be maintained for one year, and a copy shall be given to the inmate when the penalty is imposed.

D. Substantial Evidence. A determination of the Disciplinary Board must be based upon substantial evidence manifested in the record of the disciplinary proceedings.

E. If any of the facts establish that the Board made a determination based upon information obtained from an unidentified informant, then the record must (1) contain some factual information from which the Board can reasonably conclude that the informant was credible and his information reliable, including independent corroborating material and (2) establish that the informant spoke with personal knowledge of the matters contained in such statement.

PUNISHABLE CONDUCT

Inmates will be subject to disciplinary action if found guilty of the following:

(a) Disobeying a lawful order of the Department Director, Assistant Director, Warden, Assistant Warden, or any officer or employee of the institution, or of any written prison rule;

(b) Escape from the institution or custody of the institutional personnel or attempt to escape including any attempt to tamper with security devices, possession of articles for such tampering or hiding in an unauthorized area;

(c) Disregard, neglect or refusal to work without valid reason;

(d) Swearing, cursing, or use of any other vulgar, abusive, insolent, threatening or any other improper language toward any other inmates, officer, or person visiting the institution or indecency in language, action or gesture at any time;

(e) Committing of any assault or battery whatsoever on employees, inmates or any person;

(f) Leaving of cell or place of assignment or other appointed place without permission;

(g) Wilfully disfiguring, damaging or destroying any part of the institution, or any materials, tools or machinery;

(h) Committing of any overt mutinous act, inciting riot and/or general disturbance in any part of the institution or on any work assignment;

(i) Being intoxicated (by homemade intoxicants or purchased intoxicants) or under the influence of any kind of alcohol, drug, barbiturates, and/or amphetamines not prescribed by an institutional medical or psychiatric physician or possession of same;

(j) Making or having possession of any type of dangerous weapon or facsimile;

(k) Failing to report to any required destination without authorized permission or valid reason;

(l) Possession of currency, coin or paper, without authorization;

(m) Forging or altering an Institutional Pass;

(n) Making or attempting to make credit contracts in any form without authorization;

(o) Giving false information to an officer or employee of the institution;

(p) Passing or receiving contraband from another inmate, visitor and/or employee regardless of the place of occurrence;

(q) Gambling of any type;

(r) Possession of a syringe and/or needle or similar device;

(s) Possession of controlled medication without prescription and authorization from an institutional medical official;

(t) Fraudulent requests of any type, i.e., check requests, commissary orders, etc., to circumvent established rules, regulations and procedures for the same;

(u) Stealing and/or unauthorized possession of state property or any property;

(v) Making unauthorized telephone calls;

(w) Refusal to submit to required examination after superior officer has determined inmate is under the influence of a narcotic and/or alcoholic stimulant;

(x) Any conduct constituting a crime under the ordinances of cities and towns and/or state or federal laws. Such conduct may subject the offender to prosecution in additional to institutional punishment.

United States Court of Appeals

For the First Circuit

[reported at 487 F. 2d 1280]

No. 73-1088

NICHOLAS A. PALMIGIANO,

APPELLANT,

v.

JOSEPH BAXTER, et al.,

APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before COFFIN, *Chief Judge*,
KILKENNY* and MCENTEE, *Circuit Judges*.

Stephen J. Fortunato, Jr., with whom *McKinnon and Fortunato* and *Ellen Katz* were on brief, for appellant.

Cary J. Coen, John M. Roney, Max Stern, Stern & Shapiro, and *Stanley A. Bass* on brief for Robert Flint and Michael Roberts, Amici Curiae.

W. Slater Allen, Jr., Assistant Attorney General, with whom *Richard J. Israel*, Attorney General was on brief, for appellee.

November 16, 1973

COFFIN, *Chief Judge*. This is an action seeking damages and declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) to redress certain alleged deprivations of procedural due process in the administration of discipline at Rhode Island's Adult Correctional Institutions (A.C.I.). Appellant is a prisoner at the A.C.I. serving a life sentence for murder. In the early evening of November 11, 1972, a fellow prisoner became violently

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* Of the Ninth Circuit, sitting by designation

ill. When by 8:50 p.m. no medical assistance had yet been provided, appellant allegedly advised other prisoners not to return to their cells for the 9:00 lock-up, in protest against the failure to provide medical attention.

Appellant was charged with "inciting a disturbance and disrupt [sic] of A.C.I. operations, which might have resulted in a riot", and summoned before a prison disciplinary board. He was informed that he might be prosecuted for a violation of state law, and that he should consult his attorney. However, his attorney was not permitted to accompany him into the prison disciplinary hearing. Just before the hearing commenced, appellant was advised by the Deputy Warden that his silence would be held against him. Even so, appellant remained silent through the hearing. The disciplinary board based its decision entirely upon the written statement submitted by a correctional officer who had witnessed the alleged infraction. Appellant was sentenced to thirty days in punitive segregation.[1] The board recommended that he lose any good time credits for which he was eligible during that period [2] and that he be considered for possible downgrading in classification at the expiration of the thirty days.[3]

[1] Punitive segregation normally requires that the prisoner be locked in his cell full time. He takes his meals in his cell, is deprived of recreation and exercise, and is not permitted to attend his work assignment. Here, appellant was locked in his cell for twenty-four hours a day during the first five days of punitive segregation, and twenty-three hours each day during the remaining twenty-five days of segregation.

[2] Pursuant to Rhode Island General Laws § 13-2-44, appellant, under sentence to imprisonment for life, was not eligible for good time credit. Were he not sentenced to life, however, he would have been entitled to a recommendation from the Warden that five days be deducted from his prison term for each month he serves on an original sentence of five or more years. Thus, if appellant had been eligible, a loss of thirty days good time would have the effect of extending his term of imprisonment by thirty days.

[3] Pursuant to the Regulations Governing Disciplinary Classification, and Mail Procedures for the Inmates at the Adult Correctional Institutions, State of Rhode Island [hereinafter the *Morris* rules], the disciplinary board may recommend to the classification board that the prisoner's status be changed. Before any downgrading of classification may occur, however, prisoners are entitled to receive (a) timely notice, (b) an opportunity to appear before the board, (c) an opportunity to call and examine witnesses, (d) explanation of the board's rationale in coming to its decision. In addition, (e) decisions of the board must be based upon substantial evidence.

Inmates may be classified into one of four categories, each category carrying with it progressively closer supervision and more restrictions. Category "A" encompasses the general prison population; category "B" entails loss of work eligibility, television, and extended yard privileges, and requires that inmates have all their meals within their cells; category "C" entails all the restrictions of category "B" with the addition that the inmate is placed in a separate living location and deprived of participation in any institutional activities; category "D" entails all the restrictions of category "C" with the additional loss of radio privileges.

After reviewing the record, the district court concluded that appellant had not been denied due process and therefore was not entitled to any of the relief he sought.[4] Although the claim of use immunity arguably did not arise in the original complaint, appellant twice moved for reconsideration of the question of whether he was deprived of his Fifth and Fourteenth Amendment rights against self-incrimination in the prison disciplinary hearing, where he had not been assured that his testimony could not be used to incriminate him in a subsequent criminal prosecution, and had been penalized for his failure to testify in the prison hearing. The district court denied both motions, concluding that the authorities on which appellant relied in support of his motion were distinguishable on their facts from the present case.

[4] The district court concluded that procedural due process was accorded the appellant in the disciplinary proceeding because he was fully advised prior to the hearing of the infraction of the rules, had an opportunity to confer with his counsel with respect thereto, had an opportunity to have a counsel-substitute during the hearing, the charges were read to him at the hearing and he was given the opportunity to explain his actions, he was informed of the evidence against him, and the decision of the disciplinary board was based on facts rationally determined.

This case is one of a lengthening list, raising the questions whether and to what extent due process exists behind prison walls. During the past decade, judicial reluctance to look behind the walls[5] has given way to a special concern that fair and orderly procedures govern there.[6] In the late 1960's federal courts established the general principle that due process follows a prisoner through the prison doors. *Jackson* v. *Bishop*, 404 F.2d 571 (8th Cir. 1969) (Blackmun, Cir. J.); *see also Johnson* v. *Avery*, 393 U.S. 483 (1969). Our own *Nolan* v. *Scafati*, 430 F.2d 548 (1970) held that whenever substantial individual interests of prisoners are at stake, "some assurances of elemental fairness are essential". In the past three years federal courts have been faced with the difficult task of giving specific content to that general principle.[7] Recently the

[5] *See* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963). *See, e.g., Roberts* v. *Pigelow*, 313 F.2d 548, 550 (4th Cir. 1963).

[6] This newly awakened judicial sensitivity is but a part of a growing concern that governmental decisions directly affecting individual interests and causing significant deprivations conform to the rudiments of due process, regardless of whether what is at stake is termed a right, privilege, liberty, or property. *See, e.g., Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (due process may require counsel in probation revocation hearings); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (due process before parole revocation); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (due process before repossession); *Bell* v. *Burson*, 402 U.S. 535 (1971) (due process before suspension of driver's license); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (due process before publicly advertised loss of right to purchase liquor); *Goldberg* v. *Kelly*, 397 U.S. 254 (1969) (due process before termination of welfare payments); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (due process before removal or garnishment of wages).

[7] *See, e.g., McDonnell* v. *Wolff*, No. 72-1331, 1332, 8th Cir. (Aug. 2, 1973); *United States ex rel. Miller* v. *Twomey*, 479 F.2d 701 (7th Cir. 1973); *Sands* v. *Wainwright*, 357 F. Supp. 1062 (M.D. Fla. 1973); *Rinehart* v. *Brewer*, 360 F. Supp. 105 (S.D. Iowa 1973); *Collins* v. *Hancock*, 354 F. Supp. 1253 (D. N.H. 1973); *Lathrop* v. *Brewer*, 340 F. Supp. 873 (S.D. Iowa 1972); *Landman* v. *Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Meola* v. *Fitzpatrick*, 322 F. Supp. 878 (D. Mass. 1971); *Clutchette* v. *Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971 appeal docketed; *Morris* v. *Travisono*, 310 F. Supp. 857 (D. R.I. 1970); *Sostre* v. *Rockefeller*, 312 F. Supp. 863 (S.D. N.Y. 1970), *rev'd in part, modified in part, aff'd in part, sub nom. Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971); *cert. denied sub nom., Sostre* v. *Oswald*, 404 U.S. 1049 (1972).

Supreme Court articulated specific requirements for minimum due process applicable to parole revocation proceedings, marking the first time that Court has ventured so directly into the area of due process rights for individuals under custodial authority. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972).

The task is a delicate one for courts because of the sensitive and precarious nature of correctional institutions. Prison officials, facing complicated and combustible situations each day, must be free to make a wide range of decisions. Much must be left to their good faith discretion. *Sawyer* v. *Sigler*, 445 F.2d 818 (8th Cir. 1971); *Marnin* v. *Pinto*, 463 F.2d 583 (3d Cir. 1972). Time has proved, however, that blind deference to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly.[8]

Control over official discretion within prison walls is vital for other reasons as well. Most decisionmaking of correctional personnel is less visible to the public than is the decisionmaking of other public officials, and therefore less likely to benefit from the inherent constraints of public discussion and scrutiny. Prisoners themselves have no opportunity to participate in a political process which

[8] *See generally*, Fox, *Why Prisoners Riot*. 35 Fed. Prob. 9 (1971).

might otherwise provide some guidance for official discretion.[9] Moreover, because prisoners are under the constant care and supervision of correctional personnel within "total institutions"[10] which regulate every aspect of their lives, there exist awesome possibilities for misuse of discretion to the extent that decisions which affect prisoners in important ways may be made arbitrarily or based upon mistakes of fact. Finally, it is coming to be realized that almost all of the 1.2 million individuals who are at any one time subject to correctional authority will eventually rejoin the rest of our citizens outside the prison walls; if they are to learn to respect public authority and to participate in the democratic control of that authority as normal citizens, they need to be able to challenge what appear to be arbitrary assertions of power by correctional officials during the course of their confinement.[11]

In determining to what extent due process safeguards are required in prison disciplinary decisions, federal courts have employed two levels of analysis, first examining whether the questioned decision is one which requires due process at all, and then deciding upon the amount of due process which seems necessary under the precise circumstances. The first determination depends upon an assessment of the inmate's stake in the decision, rather than upon a weighing of the inmate's interest against the interests of the state. *See Morrissey* v. *Brewer*, 408 U.S. 471, 483 (1972); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972);

[9] *See* Note, *Bargaining in Correctional Institutions: Restructuring the Relations Between the Inmate and Prison Authority*, 81 Yale L. J. 726 (1972); McCleery, *The Governmental Process and Informal Social Control*, in The Prison 149 (D. Cressey, ed., 1961).

[10] E. Goffman, *On the Characteristics of Total Institutions*, in Asylums 49 (1961). *See also* Cloward, *Social Control in the Prison*, in Theoretical Studies in Social Organization of the Prison 20 (Social Science Research Council, ed., 1960).

[11] President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections* 82 (1967).

Board of Regents v. *Roth*, 408 U.S. 564, 570-71 (1972). The stake will be sufficiently large to necessitate some due process if the consequences of the challenged actions of the state officials are sufficiently serious to amount to a "grievous loss". *See Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *Morrissey* v. *Brewer, supra*, 408 U.S. at 481.

In a prison setting where liberty is by necessity shrunken to a small set of minor amenities, such as work or schooling privileges, visitations, and some modicum of privacy, it is likely that any marked change of status which forecloses such liberties will be perceived and felt as a grievous loss. *United States ex rel. Miller* v. *Twomey, supra*, 479 F.2d at 717. This implies that a minimal level of due process must be achieved in reaching any decision concerning a particular inmate which may result in a marked change in the status of the inmate's confinement, with the result that he may be deprived of amenities on which he has come to rely. The stakes are simply too high for the inmate, and the possibility for honest error or irritable misjudgment too great, to allow such decisions to be taken without giving the inmate a chance to be fully informed of the case against him so that he may contest its basis. "In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him . . . and afforded a reasonable opportunity to explain his actions." *Sostre* v. *McGinnis, supra*, 442 F.2d at 198. This is as true for a decision based on the security requirements of the institution or the rehabilitative interests of the inmate as it is for one based on a disciplinary violation.

Once it has been determined that the inmate's stake in the decision is sufficient to require a minimal level of due process safeguards, the second task facing the court,

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more difficult and more subtle, is to decide how much due process is required beyond this minimal level. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action." *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). After the precise interests of the inmate and the state have been identified, the two interests are weighed one against the other. *See Goldberg* v. *Kelly, supra*, 397 U.S. at 261; *Hannah* v. *Larche*, 363 U.S. 520, 442 (1960).

Here, there is no question that some due process was required before appellant could be sentenced to punitive segregation and recommended for a downgraded classification.[12] The real question concerns the extent to which due process was required. Pursuant to the so-called *Morris* rules,[13] appellant was given (a) timely notice of the charge against him, (b) an opportunity to appear at the disciplinary hearing with the assistance of an authorized counsel-substitute, (c) an impartial tribunal, none of whose members reported upon or witnessed the alleged infraction, (d) the right to call witnesses and cross-examine them, (e) the right to a decision based upon "substantial evi-

[12] *See* nn. 1-3.

[13] In *Morris* v. *Travisono*, 310 F. Supp. 857, 859 (D.R.I. 1970), the district court, in a significant and innovative role, oversaw negotiations between prisoners and prison officials and ordered that the results of the negotiations be printed and distributed to prisoners for their final approval. After receiving responses from the inmates to the proposed regulations, the court then implemented the rules by an interim decree, *id.* at 862, but retained jurisdiction to allow for necessary changes and to make sure that the new rules were implemented. The new rules were officially promulgated by the Assistant Director for Correctional Services in February, 1970. *See Regulations Governing Disciplinary Classification, and Mail Procedures for All Inmates at the Adult Correctional Institutions, State of Rhode Island* (1970).

dence", (f) notice of the rationale and consequences of the decision, and (g) the opportunity to appeal the decision to the Warden. Appellant contends that he should have been afforded the additional protections of the right to remain silent in the disciplinary hearing without his silence being used against him, the right to have the correctional officer who reported the infraction and any witnesses on whose testimony the fact-finding is based appear in person before the disciplinary board, and the right to retained counsel at the hearing. In effect, appellant argues that a proper balance of the state's interest in efficient custody against the possibly grievous consequences of prison discipline in this case—including punitive segregation, loss of prison earnings for that period, recommended change in classification, possible effect of the decision upon his chances for parole,[14] and possible use of the hearing record in a subsequent criminal prosecution—warranted greater due process safeguards than those offered by the *Morris* rules.

The task of striking a proper balance between appellant's interest in due process safeguards and the state's interest in efficient custody is at best an awkward and difficult one. No well defined standards have been developed for taking such measurements,[15] and a utilitarian calculus

[14] The findings of the disciplinary board may be taken into consideration at parole board hearings, as well as at classification board hearings. According to the *Morris* rules, *supra*, n. 13, the central file of each inmate committed to the A.C.I. for more than one year must include (a) regular case summaries; (b) probation officer's report and other diagnostic summaries from other agencies; (c) up-to-date progress reports in the areas of work assignments, vocational training, education, psychiatry, and medical treatment; (d) records of disciplinary board determinations; (e) any correspondence relating to the inmate; (f) identification material; (g) a record of all classification transactions.

[15] While some standards are emerging as to how much due process is due in the maintenance of prison discipline, *see Miller* v. *Twomey, supra; McDonnell* v. *Wolff, supra; Sands* v. *Wainwright, supra;*

of the benefits of possessing certain rights against the costs of supplying them seems a harsh and futile exercise in legal fiction. Moreover, it is an exercise that is bound to create uncertainty and litigation, given the extraordinary and expanding range of correctional decisions that may result in a variety of deprivations, and the ever broadening catalogue of procedural rights which might be relevant to the prison setting.[16] Yet certainty and consistency are no

Rinehart v. *Brewer*, *supra*; *Collins* v. *Hancock*, *supra*, the courts have not as yet articulated the methodology they employ in arriving at the appropriate balance between due process and the interests of the state in efficient custody. While there seems to be some general agreement that the extent of due process required by *Goldberg* v. *Kelly*, *supra* and *Morrissey* v. *Brewer*, *supra*, frames the outer limit of due process required within prison walls, federal courts have failed to come up with any useful measuring rod for determining the extent of due process within this outer limit. *See* Wick, *Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements*, 18 S.D. L. Rev. 309 (1973).

[16] As the correctional facility adds new rehabilitative programs and activities, administrative discretion becomes broader. The correctional officer or administrator can, in some cases, decide upon various degrees of custody within the same category of classification; he can offer schooling, jobs, and training programs (or decide not to offer them); he can grant furloughs, work-release, school release, weekend release (or stop granting them); he can provide the inmate with an interesting and relatively lucrative job assignment, or a poor one. *See* Rubow and Elias, *Organizational Boundaries, Inmate Roles, and Rehabilitation*, 6 Crime and Delinquency 8 (1969); *see generally*, Sykes, *The Corruption of Authority and Rehabilitation*, 34 Soc. Forces, 257 (1956).

At the same time, the possible catalogue of procedural rights which might be applicable inside the prisons grows longer. The possible catalogue of rights might include, beyond what is already provided in the *Morris* rules, a right to the promulgation of written regulations which are reasonably specific, the suppression of any evidence which was wrongly discovered, the power to subpoena witnesses, and the power of discovery, a transcript of the disciplinary proceedings, formal rules of evidence during the hearing, a jury of peers, conviction only upon the overcoming of a high presumption of innocence, and direct appeal. We hasten to add that this catloguing is not an invitation to inmates to further litigation but, rather is merely intended to illustrate the wide variety of safeguards encompassed within the concept of procedural due process.

less desirable in the law relating to life in prison than they are in life beyond the walls.

The primary responsibility for articulating standards of due process lies with those who have the most intimate knowledge of both the interests of prisoners and the administrative burdens entailed with providing due process within prison. To the extent that legislators, prison officials, and prisoners themselves have spoken on the subject, they provide an essential source of guidance. We are fortunate in this case to have a set of rules for due process within prison that was carefully shaped by prisoners and correctional administrators working together under the aegis of the district court. The *Morris* rules have provided a workable and useful standard for measuring the extent to which due process safeguards are required in correctional decisions which may result in punitive segregation, loss of good time, and changes in classification. Moreover, the standard is substantially the same as that employed elsewhere within this circuit, *see Collins* v. *Hancock*, *supra*; *Meola* v. *Fitzpatrick*, *supra*, and conforms in large part to the standard set out in model legislation.[17]

The *Morris* rules, however, do not necessarily exhaust the constitutional imperative of the due process clause, or fill all the fissures. No questions are more elusive for courts than these: when does a *constitutional* interstice exist? By what reasoned process, consistent with constitutional precedents, changing perspectives of foreseeability

[17] *See*, *e.g.*, Boston University's Center for Criminal Justice, *Model Rules and Regulations on Prisoner's Rights and Responsibilities* (1973); National Council on Crime and Delinquency, *Model Act to Provide for Minimum Standards for the Protection of the Rights of Prisoners* § 4, 18 Crime and Delinquency 12 (1972); President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections* 86 (1967); *see also* legislation introduced in Congress which was designed to provide minimal procedural safeguards for prisoners in the maintenance of prison discipline, H.R. 12757, 92nd Cong., 2d Session (1972).

and expectation and realistic restraints of practicability, can courts attempt to fill such a gap? While constitutional analysis on a macroscopic scale, dealing with the liberties specifically enshrined in the Bill of Rights, is rich with precedent, its application to the smaller liberties and their deprivations is still a new venture. *But see* n. 6. And the standards for measuring and balancing the interests of the individual and of society, except where one side or the other has the most compelling appeal, are as yet unarticulated. But unless a court were to accept the concept that the Constitution is limited to preventing only the grossest of governmental encroachments on personal freedoms, it must try to deal rationally with the emerging problems. While not usurping the legislative or executive roles, it must articulate a constitutional framework specific enough to guide government in government's own continuing pursuit of constitutional norms.

We are fully sensitive to the fact that public administrators may view court decisions affecting "lesser" rights as intrusions into their own realm, and as setting the outer limits of constitutional accommodation. Two observations can help place this area of adjudication in perspective. The first is that the "realm" is that of the Constitution, and that the Constitution is, in the first instance, addressed to government and its officials; this is the premise, not the consequence, of judicial review. The second is that a court decision can most constructively be taken as not only prescribing, as a minimum, a specific rule arising out of a particular case, but as a helpful guide in suggesting the direction in which administrators may soundly proceed with their more detailed implementation.

The government would have us merely examine whether or not the current limitations upon due process are rationally related to the legitimate state goal of efficient custody; if such a rational relationship were found to exist, then

the procedural safeguard would be unwarranted.[18] We cannot accept, even by implication, this formulation of the rule in the type of situation presented by this case. While due process safeguards have not as yet been elevated to the status of fundamental rights, such as freedom of speech, in relation to which the state's interests in administrative efficiency must take second place, they are not to be abridged unnecessarily. That is, we think that if the state can accomplish its purpose just as well by observing some measure of due process as by not observing it, it should tread the former path. Where a due process safeguard entails little or no administrative burden, it should be employed whenever due process is merited. If the burden on the state is minimal, there seems to be no reason why the decision should not be made with the greatest possible care.

Perhaps because there may be few situations where it can be said that little or no administrative burden attends the provision of some due process safeguards, courts have not had occasion to speak in these precise terms. But we think this threshold test, limited though it may be in application, is but an extrapolation of the Court's pronouncements in larger matters. The government's obligation here is fundamentally the same as that underlying its obligation to use "less drastic means" when infringing upon First Amendment rights, *see United States* v. *Robel*, 389 U.S. 258, 267 (1967); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960),[19] or its obligation to use the "least restrictive alternative" when impinging up travel, free flow of commerce, or property rights, *see Aptheker* v. *Secretary of State*, 378 U.S. 500, 507 (1964); *Polar Ice Cream and Creamery Co.* v. *Andrews*, 375 U.S. 361, 375 n. 9 (1964);

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[18] *See, e.g.*, the rational relation upheld in *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

[19] *See* Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969); *see generally*, Wormuth and Merkin, *The Doctrine of the Reasonable Alternative*, 9 Utah L. Rev. 254, 267 (1964).

Dean Milk Co. v. *City of Madison*, 340 U.S. 349, 354 (1951);[20] *see also Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965). When the government has "reasonable and adequate alternatives available" to a given end, it must choose the measure which least interferes with individual liberties. *Dean Milk Co.* v. *City of Madison*, *supra*, 340 U.S. at 354. In the present case, if the government can achieve its goal of efficient custody equally well under an alternative scheme which provides greater due process safeguards, it is obligated to follow that alternative.

With this principle in mind, we turn to an examination of each of the due process claims of the appellant.

Appellant's contention that he should have been afforded the additional protection, beyond the *Morris* rules, of the right to remain silent without his silence being used against him in the disciplinary hearing is based upon an understandable fear that any statements made at the hearing might have been used against him at a later criminal trial concerning the same offense. Without a right to remain silent in the disciplinary hearing, he faced the constitutionally obnoxious dilemma of either remaining silent and risking greater punishment from the disciplinary board or speaking out in his own defense and risking self-incrimination in a subsequent criminal prosecution. *See Garrity* v. *New Jersey*, 385 U.S. 493, 496 (1967). Thus, to penalize silence in the disciplinary hearing is, in effect, to penalize the Fifth Amendment privilege against self-incrimination. *See Spivack* v. *Klein*, 385 U.S. 511 (1967); *United States* v. *Jackson*, 390 U.S. 570, 581-82 (1968); *Simmons* v. *United States*, 290 U.S. 377 (1968); *Melson* v. *Sard*, 402 F.2d 653 (1968); *Carter* v. *McGinnis*, 351 F. Supp. 787 (W.D. N.Y. 1972).[21] Although under *Miranda* v. *Arizona*, 384 U.S. 436

[20] *See* Struve, *The Less Restrictive Alternative Principle and Economic Due Process*, 80 Harv. L. Rev. 1463 (1967).

[21] The government's reliance upon *McGautha* v. *California*, 402 U.S. 183 (1971) in this regard is misplaced. While *McGautha* holds that a defendant faced with the difficult conundrum in a unitary trial of speaking out for a lenient sentence and risking self-incrimination on the issue of guilt is not denied the protection of the Fifth Amendment, the choice facing prisoners within a prison disciplinary hearing is far different. A criminal defendant faces many difficult choices during the course of his trial: whenever he exercises his right to remain silent, he quite naturally sacrifices one means of defense; on the other hand, if he speaks out, he may open himself to otherwise inadmissible matters which may be brought out on cross-examination and also to impeachment by proof of prior convictions. *See Spencer* v. *Texas*, 385 U.S. 554, 561 (1967). The dilemma faced in *McGautha* is but one variant on these traditional, strategic considerations that run through criminal trials. It should be kept in mind, however, that a defendant in a criminal trial may remain silent and yet still have the opportunity to mount a strong defense by calling and cross-examining witnesses. He is also protected by the high burden of proof which the government must sustain before he can be found guilty. Under these circumstances, silence is not a fundamental sacrifice. It is often a wise strategy.

The accused prisoner, however, has no such procedural safeguards within the prison hearings. His opportunity to call witnesses and cross-examine them is necessarily limited by the possibility that the disciplinary board may rely upon informants. The burden of proof which must be sustained against him is far lower than in a criminal trial, merely calling for "substantial evidence". If he keeps silent, his silence is almost bound to seriously cripple his defense within the disciplinary hearing. Silence is not a strategic alternative for him.

(1966) and *Mathis* v. *United States*, 391 U.S. 1, 4-5 (1968), any incriminating statements made within a custodial interrogation would presumably be suppressed at a subsequent criminal trial, the exclusionary rule provides scant protection where, as here, a defendant can never by wholly certain that his statements will be suppressed later on, especially since his actions may be interpreted as a voluntary waiver of such rights. Moreover, even if suppressed, defendants' statements within the disciplinary hearing may be useful to state prosecutors in planning and developing their prosecution. Evidence derived from such testimony may be seriously damaging to the defendant; the mere prospect of its use is likely to seriously inhibit the defendant from making any statements whatsoever. And because state prosecutors are apt to be interested in

gathering evidence concerning a wide range of offenses occurring both inside and outside the prison walls, and implicating many prisoners, defendants within a prison disciplinary hearing may have an understandble fear of "fishing expeditions" designed to gather information. *See Sands* v. *Wainwright, supra; Carter* v. *McGinnis, supra; Clutchette* v. *Procunier, supra,* 328 F. Supp. at 778-79.

The right to remain silent in the disciplinary hearing without his silence being used against the inmate would, however, impose a significant burden upon the processes of fact finding within the disciplinary hearing. The hearings are designed to enable inmates to challenge and dispute allegations about their behavior, and to explain "their side of the story".[22] The practical effect of a right to remain silent would be to eliminate such an opportunity, and force the inmate and the disciplinary board to rely exclusively upon the statements of witnesses. Not only would such reliance be time consuming, but it might also prompt inmates "to pit their own resources against correctional staff in ways that challenge institutional solidarity and encourage confrontations in other areas".[23] Moreover, an exercise of the right to remain silent does not impose a significant burden upon the defendant in a normal criminal trial, because of such procedural safeguards as a strong presumption of innocence, a high burden of proof which the prosecution must overcome, and the full right to call witnesses and cross-examine adverse witnesses. Such safeguards, however, do not exist within the prison disciplinary hearing; if they did, the administrative burdens thereby entailed would be significant. Thus, an inmate's silence is likely to work against him in the disciplinary hearing,

[22] *See* Lovell and Nelson, *Correctional Management and the Changing Goals of Correction*, in Problems in Criminal Justice Administration 82 (M. Cohn, ed., 1969).

[23] Note, *Bargaining in Correctional Institutions*, *supra*, at 733.

because in maintaining his silence he sacrifices his most important defense.

We need not enter into a balancing equation concerning the right to remain silent, however, because another route is open which would protect the inmate from self-incrimination in a subsequent criminal prosecution, while imposing no burden upon the prison disciplinary hearing. Where the possibility exists of the inmate being penalized for the same criminal conduct in a disciplinary hearing and a criminal trial, he should be entitled to "use" immunity for statements he might make within the prison disciplinary hearing. *See Sands* v. *Wainwright, supra,* 357 F. Supp. at 1093; *Carter* v. *McGinnis, supra,* 351 F. Supp. at 793; *cf. Melson* v. *Sard,* 402 F.2d 653, 655 (D.C. Cir. 1968); *Kastigar* v. *United States,* 406 U.S. 441 (1972). The provision of use immunity reflects a rational accommodation between the imperatives of the privilege against self-incrimination and the legitimate requirements of prison disciplinary procedures. In order for this immunity to be helpful to the inmate, however, it would be necessary that he be informed of its existence and its consequences at the prison disciplinary hearing.

Appellant's second contention is that the disciplinary board should have required adverse witnesses to appear in person before it, rather than rely solely upon the written reports of prison personnel. Although the *Morris* rules specifically provide an accused inmate with "the right to call a reasonable number of witnesses, both adverse and favorable, and examine said witnesses",[24] appellant did not exercise his right to confront and cross-examine the complaining officer who witnessed the alleged infraction. Appellant claims, instead, that the burden of summoning adverse witnesses should be upon the disciplinary board, rather than upon the accused inmate. If the board declines

[24] *Morris* rules, Disciplinary Procedures § III,C,4.

to take the initiative and chooses to rely exclusively upon written reports, appellant argues that the board would thereby lack sufficient evidence to convict.

We disagree. We can envisage situations in which the board might justifiably conclude that written reports were sufficiently clear and complete so that further incriminating evidence was unnecessary. So long as the accused inmate might bolster his defense by having the opportunity to call adverse witnesses and cross-examine them, no purpose would be served by creating a per se rule that the board itself must rely only upon witnesses who appear before it. We would caution, however, that in instances where the identity of an adverse witness is withheld from an accused inmate, out of a legitimate fear that otherwise the witness would be subject to retributive violence,[25] the board has a strong obligation to summon the adverse witness before it, in camera, and probe the credibility of the witness. *See Birzon* v. *King*, 469 F.2d 1241 (2d Cir. 1972).

Appellant's final contention is that due process requires that he be allowed to retain legal counsel within the disciplinary hearing. The *Morris* rules provide for the assistance of a classification counselor or other individual specifically approved by the prison administration if the accused inmate requests help in the presentation of his case before the board.[26] Here, the appellant was offered the assistance of a counsel-substitute during the hearing, and was permitted to consult with his retained legal counsel immediately before the hearing, but his retained counsel was barred from the hearing.

---

[25] *Id.* at § III,C,3.

[26] *Id.* § III,C,5. We necessarily assume that counsel-substitute, reasonably experienced in the procedures to be employed in prison disciplinary hearings, will explain questions put to the accused, occasionally help the accused make himself understood, and advise the accused on how to proceed with his questioning of the complaining officer or witnesses to the infraction.

Appellant relies upon *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), in which the Supreme Court indicated that, under some circumstances, counsel might be required within probation revocation hearings. We think, however, that appellant's reliance is misplaced. In *Gagnon*, the Court did no more than leave the decision whether to supply counsel up to the discretion of the state, saying that "the participation of counsel will probably be both undesirable and constitutionally unnecessary" in most cases, and that the state should consider, among other things, the complexity of the evidence and "whether the probationer appears to be capable of speaking effectively for himself." *Gagnon* v. *Scarpelli, supra*, 411 U.S. at 790. Here, there is no claim that the complexity of the evidence or special difficulties of communicating to the disciplinary board made counsel imperative.

While we are well aware that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel", *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932), we do not feel that prison disciplinary hearings necessarily require professionally trained counsel. The requirement of professionally trained counsel in all cases could amount to a significant expense for the government, both in supplying counsel for the accused and, because the hearing is likely to become more adversarial as a result, in prolonging the proceeding and making it necessary for the state to be represented by its own attorney. The state is not now represented by a prosecutor within the hearings, nor are formal rules of evidence in force to the extent that a defendant's procedural rights may be lost if not timely raised. Nor is there a jury for whom a defendant's presentation must be made understandable. *See Gagnon* v. *Scarpelli, supra*, 411 U.S. at 789. Moreover, the evidence as to whether the inmate has violated a prison regulation is likely to be

simpler, more precise and more readily at hand than in most criminal trials, *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971). While the requirement of legal counsel might be more compelling where the accused, faced with a possible criminal prosecution in the future, had to walk a tightrope between defending himself now and incriminating himself later on, the provision of use immunity eliminates this potentially complicated endeavor. We have no reason to believe that counsel-substitute, of the sort provided for in the *Morris* rules, will not normally provide adequate assistance to an accused inmate within the disciplinary hearing.

Appellant emphasizes that any mistakes of fact which may have slipped through the hearing are likely to find their way to the State Parole Board when appellant is eligible for parole, and that the presence of counsel at the hearing would have prevented this. Several courts have recognized the damaging nature of a mistake of fact in an inmate's prison record which may follow him through the prison system, unfairly punishing him anew each time his record is used against him. *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967); *McDonald* v. *Wolf*, No. 72-1331, 8th Cir. (Aug. 2, 1973); *Hudson* v. *Hardy*, 424 F.2d 854, 856 (D.C. Cir. 1970). But we think that a counsel-substitute can be sufficiently effective within most hearing to protect against any serious mistakes of fact on which the disciplinary board might base its findings. Moreover, because a variety of reports and unsupported allegations of fact by correctional personnel may find their way, at various times, into the inmate's prison record, a far better way of protecting the inmate from such mistakes would be to let him review and challenge his record whenever correctional decisions are based, wholly or in part, upon the prison record.

While we therefore conclude that there is, under normal circumstances, no duty upon the state to furnish counsel

in prison disciplinary hearings, we are also of the opinion that an inmate should be permitted to bring retained counsel with him into the disciplinary hearing.[27] We adhere to the approach of the Supreme Court in *Goldberg* v. *Kelly*, *supra* 397 U.S. at 270, 271 (1969) in saying that the right to retained counsel is constitutionally required where grievous loss is threatened and the presence of retained counsel will not unduly prolong or otherwise encumber the hearing.[28] While authority is scarce in this

[27] In light of our principle of extending procedural due process where there is little or no administrative burden, we assume that counsel's role would be limited to consultation with the accused, observation of the proceedings, and occasionally speaking on behalf of the accused. Under our approach, it is likely that a larger role than this would begin to create an unwarranted administrative burden. Thus, counsel would not participate in cross-examination, for that might understandably prompt the prison officials to obtain legal counsel to represent the prosecution's side of the adversarial process.

[28] Whatever the constitutional distinction between the right to retained counsel as opposed to appointed counsel, it is clear that the former is historically broader in scope than the latter. *See* Davis, *Administrative Law Treatise*, § 8.10 (1958). Contrary to the suggestion of our dissenting brother, we do not here purport to exercise any supervisory power.

We acknowledge that to permit retained counsel while not requiring appointed counsel might deny those who could not afford their own retained counsel the equal protection of the laws, a circumstance found by two circuits to arise in parole revocation proceedings, *Earnest* v. *Willingham*, 406 F.2d 681, 684 (10th Cir. 1969), and probation revocation proceedings, *Wainwright* v. *Cottle*, 13 Cr. L. 2176 (5th Cir. 1973), *vacated and remanded*, 42 U.S.L.W. 3218 (Oct. 16, 1973).

We do not, however, deal with that issue at this time. The prison administrative hearing, even when resulting in segregation or loss of good time, may require less of an adversarial proceeding and necessitate fewer due process safeguards than a hearing which could result in the revocation of the liberty entailed in parole or probation. Consequently, the possibility of a denial of equal protection for inmates too poor to afford retained counsel may be reduced in the prison context. Moreover, both *Earnest* and *Wainwright* were decided before *Gagnon's* ad hoc rule for deciding when counsel is to be required in revocation proceedings. Apparently the Supreme Court felt that *Gagnon's* rationale was sufficiently relevant to vacate *Wainwright* and remand it for further consideration in light of *Gagnon*.

developing area of law, the few courts which have faced this particular issue have permitted retained counsel, *see Landman* v. *Brewer, supra,* 333 F. Supp. at 654; *Sands* v. *Wainwright, supra,* 357 F. Supp. at 1089.

Retained counsel might benefit the accused in several ways. Counsel could speak on behalf of the accused at the hearing, particularly in those cases where the accused inmate was inarticulate or had difficulty understanding the questions put to him. In addition, counsel's presence at the disciplinary hearing and later recollection of what occurred therein might help assure that the immunity accorded the inmate is not violated in subsequent proceedings. The occasional presence of counsel might also have the helpful cautionary effect of assuring that all necessary due process safeguards were provided for within the hearing.

The presence of retained counsel at the disciplinary hearing could also benefit the correctional administration of the prison. Counsel might provide correctional administrators with useful guidance in novel situations where no procedural rules had as yet been developed. And because the precise rudiments of prison disciplinary hearings exist in a developing area of the law where no firm guidelines exist, trained legal counsel may be of important assistance in reaching accommodations between inmates and administrators which would avoid the necessity of continued litigation.

Finally, since inmates are currently permitted to consult with their retained counsel at the A.C.I. outside the disciplinary hearing, we can see no rational purpose served by not allowing them access to their counsel within the hearing. On the contrary, intermittent consultations with retained counsel outside the hearing room while the hearing is in progress would seem to result in unnecessary prolongation of the proceedings. Moreover, the government has

offered no reason why retained counsel should not be permitted within the disciplinary hearings.

We therefore conclude that appellant was denied due process in the disciplinary hearing only insofar as he was not provided with use immunity for statements he might have made within the disciplinary hearing, and because he was denied access to retained counsel within the hearing. Since, however, this solution is novel, the appellee cannot in fairness be subjected to a sanction which would ordinarily accompany the violation of preexisting law, *Jones* v. *Rundle,* 358 FS 939 (June 12, 1973); *cf. Great Northern Railway Co.* v. *Sunburst Oil and Refining Co.,* 287 U.S. 358 (1932). It follows that appellant's claim for money damages must be denied. However, appellant's in-prison record will be expunged of all findings and decisions pertaining to the alleged infraction and the disciplinary board hearing. We will apply this rule in the future only to those cases where a disciplinary hearing occurs subsequent to the date of this opinion.

The judgment is reversed.

KILKENNY, *Circuit Judge,* (dissenting).

I respectfully dissent. In my opinion, the prison officials were under no constitutional, or other, duty to inform the appellant of the existence and possible benefits of the doctrine of "use immunity" in connection with statements that he might make in the prison disciplinary hearing. Indeed, if such a duty existed, appellant is in no position to assert it. He had the advice of retained counsel, who, we must assume, was familiar with the doctrine and, evidently, in weighing the consequences decided not to suggest its use.

Moreover, I am acquainted with no legal doctrine which

would require the presence of appellant's counsel at the time of the hearing. If, as in *United States* v. *Ash*, 413 U.S. —— (June 21, 1973), a defendant charged with the crime of bank robbery is not entitled to the presence of counsel during a pre-indictment display of photographs arranged for the specific purpose of identification, I fail to understand how we, in this type of hearing in the exercise of alleged supervisory powers, can direct states to permit the presence of retained counsel. For that matter, I am unable to discover a legal principle which would require the presence of retained counsel at a hearing, and then deny to a prisoner the presence of court appointed counsel at the same type of hearing. If fundamental fairness requires the presence of counsel at one, it necessarily requires such presence at the other.

Inasmuch as I believe that the so-called Morris Rules adequately protect a prisoner's limited fundamental rights, and that appellant's other claims do not present issues of constitutional dimensions, I would affirm.

UNITED STATES SUPREME COURT

July 8, 1974

[reported 418 U.S. 908 (1974)]

No. 73-1247. BAXTER ET AL *v.* PALMIGIANO. C.A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wolff* v. *McDonnell*, *ante*, p. 539. Reported below: 487 F.2d 1280.

NOTE: The Opinion of the United States Court of Appeals for the First Circuit, filed December 20, 1974, is reproduced in Appendix A to the Petition for Writ of Certiorari filed in this case on March 19, 1975.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
INTER-OFFICE MEMO

Date: March 14, 1975

To: Joel Landry, Assistant Legal Counsel
Adult Correctional Institutions
Dept.: Corrections
From: Roger M. Donnelly, Hearing Officer
Adult Correctional Institutions
Dept.: Corrections
Subject: *Backlog of Disciplinary Reports*

Sir,

As of this date, total regular bookings number 130. Total bookings requiring attorneys present is 50. The grand total is 180. On the regular bookings, we can average 8 cases a day. On required attorney bookings, we can average 5 per day. At this projection, on a 4½ day work week we are 24 days behind from the infraction to hearing. This projection is correct if we are able to get the attorneys at the hearing on appointment dates and times. If, we are able to get all officer witnesses to be present during hearings without delays due to the shortage of personnel, days off, etc., if the board has a place to meet, and if there is a member of custody able to sit on the board in the mornings at Maximum Security. It has been my experience over the past seven (7) months to only have ideal conditions on approximately 25% of all cases heard. To date, I have come across three (3) inmates who have refused a legal assistance attorney provided by the state. These inmates requested their own attorneys. At this point, the hearing had to be continued. But, it seems that their own attorneys are hard to reach, too busy, etc. and without being able to give notice for forthcoming hearings to these attorneys, I find it impossible to schedule. Once word gets out to the inmates that by requesting their own attorneys

to be present, this will become very fashionable to do with inmates wishing to prolong the hearing dates, thus giving the board yet another obstacle.

Respectfully submitted,

(s) Roger M. Donnelly, Hearing Officer

RMD/gl

cc: James W. Mullen, Warden
Robert E. Houle, Assistant Warden
File (1)

DISCIPLINARY REPORT LOG – DECEMBER, 1974 THROUGH NOVEMBER, 1975

MONTH	NUMBER OF HEARINGS	NUMBER OF INMATES	TOTAL = OF INMATES	GUILTY	NOT GUILTY	DISMISSED	POSTPONED
DECEMBER	100	66	63	83	4	13	
JANUARY	69	57	55	58	7	4	
FEBRUARY	101	54	48	76	5	20	
MARCH	118	64	57	102	4	12	
APRIL	140	82	76	92	5	43	
MAY	175	79	78	137	10	28	
SUBTOTAL	703	402	377	548	35	120	
JUNE	123	84	80	93	7	23	
JULY							
AUGUST							
SEPTEMBER							
OCTOBER .							
NOVEMBER							
TOTAL							

MONTH	NO. OF HEARINGS	INMATES Total	Actual =	GUILTY	NOT GUILTY	DISMISSED	POSTPONED
Dec. 1973	47	39	36 [1]	39	3	3	2
Jan. 1974	67	56	47 [3]	54	5	7	1
February	51	44	33 [2]	42	7	2	0
March	97	90	72 [2]	74	14	9	0
April	61	58	44 [3]	48	5	8	0
May	67	59	39 [5]	45	15	7	0
SUBTOTAL	390	346	271 [16]	302	49	36	3
June	69	57	49 [1]	55	5	9	0
July	76	49	38 [4]	59	7	9	1
August	70	57	47 [1]	54	10	6	0
Sept.	76	60	52	61	11	4	0
October	108	93	74	88	9	11	0
November	90	69	66	69	7	14	0
TOTAL	879	731	597	688	98	89	4

Supreme Court, U. S.
FILED
MAY 19 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1187

JOSEPH BAXTER, et al
Petitioner

-vs-

NICHOLAS A. PALMIGIANO
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

I. Opinion Below

The opinion of the United States Court of Appeals for the First Circuit rendered December 20, 1974, is affixed to Petitioners' Petition for Writ of Certiorari as Appendix A, p. 10.

II. Jurisdiction

The Respondent does not contest the Petitioners' jurisdictional statement (Petition for Writ of Certiorari, p.2) but hastens to add that the Rhode Island prison officials who seek the issuance of a Writ of Certiorari go considerably outside the record and the decision of the United States Court of Appeals for the First Circuit in stating the facts and the issues they seek to have reviewed. This point will be discussed below.

III. Questions Presented

1. Whether a prisoner is entitled to the presence of counsel at an in-prison disciplinary hearing when the facts which gave rise to the disciplinary hearing may also give rise to a criminal prosecution.

McKINNON & FORTUNATO
ATTORNEYS AT LAW
1150 NEWPORT AVENUE
PAWTUCKET, R. I. 02861

2. May a State prisoner, under the Fifth and Fourteenth Amendments to the United States Constitution, remain silent in the face of interrogation at a prison disciplinary hearing, without having his silence used against him at that time or in future proceedings.

IV. Statement of Facts and Travel of Case

This matter has been before the United States Supreme Court on a previous occasion. Joseph Baxter, et al v Nicholas A. Palmigiano, October term, 1973, No. 73-1247. The matter was remanded to the United States Court of Appeals for reconsideration in light of this Court's decision in Wolff v McDonnell, 418 U.S. 539 (1974). After receiving additional legal memoranda from counsel and reviewing the case pursuant to the remand, the United States Court of Appeals for the First Circuit rendered its decision on December 20, 1974, the Slip Opinion of which decision is affixed to petitioner's Petition for a Writ of Certiorari as Appendix A.

In seeking to have this Court review the decision of the United States Court of Appeals, the petitioners have in several instances gone well outside the evidence and record in the case. Your respondent, Nicholas A. Palmigiano, a prisoner under life term at the Adult Correctional Institutions in Howard, Rhode Island, stresses that there is nothing in the record to support the assertion of the petitioners made at Page 3 of their petition that the system of disciplinary procedures in effect under the order entered in Morris v Travisono, 310 F. supp. 857 (D.R.I. 1970) "operated with great difficulty for three years". Nor does the record show, nor was any evidence ever offered at the trial of this matter tending to show, that "almost all disciplinary hearings involved possession of weapons, drugs, assaults, and matters which can also be subject of criminal prosecution...", or that "[f]ollowing Baxter II, defense counsel has been supplied at every disciplinary hearing. The hearing officer is now over two-hundred cases

behind, whereas before Baxter II the backlog never exceeded thirty cases." Petitioner's Petition for Writ of Certiorari, p. 7.

Additionally, in their statement of facts, your petitioners declared that prisoner Palmigiano "was advised by a Deputy Warden that he had the right to remain silent during the hearing," Petition for Writ of Certiorari, p. 3, but the petitioners failed to add that the Deputy Warden informed Palmigiano that his silence would be used against him. This fact was not overlooked by the United States Court of Appeals for the First Circuit in its decision. Slip Opinion, Petition for Writ of Certiorari, Appendix A, p.11. The Court of Appeals also noted another significant fact, namely that "the inmate was specifically advised that the facts giving rise to the disciplinary hearing could also lead to State prosecution..." Slip Opinion, Petition for Writ of Certiorari, Appendix A, p.11.

In short, your respondent submits that the legally significant facts to be considered by this COURT and which in fact are supported by the record and were considered by the United States Court of Appeals in Palmigiano v Baxter, 487 F. 2d 1280 (1973), and the Slip Opinion of December 20, 1974, Supra, are that Palmigiano was charged with an in-prison rule violation on a set of facts that could also give rise to a criminal charge and then denied the presence of counsel when brought before a disciplinary board for an inquiry into the violation, which inquiry also included the putting of questions to prisoner Palmigiano.

This matter was brought for an individual and not as a class action, and the United States Court of Appeals treated it as such; the references by the petitioners to general prison conditions and disciplinary proceedings go beyond the record and, in any event, are totally irrelevant to the narrow issue in this case.

McKINNON & FORTUNATO
ATTORNEYS AT LAW
166 DEPORT AVENUE
PORTLAND, R. I. 02907

V. Argument

1. Inasmuch as the holding in Wolff v McDonnell, 418 U.S. 539 (1974) does not in any way vitiate the holdings in Mathis v United States, 391 U.S. (1968) and Miranda v Arizona, 384 U.S. 436 (1966), the United States Court of Appeals for the First Circuit has not rejected precedent or reached a novel conclusion by declaring that a prisoner, at an in-prison disciplinary proceeding involving a factual situation that could lead to future criminal prosecution, may invoke the Fifth Amendment privilege against self-incrimination and may have the assistance of counsel during an interrogation process that happens to be coincidental with a disciplinary hearing.

There can be no dispute that a prisoner under sentence for one crime is to be afforded the so-called Miranda protections when being questions by law enforcement officials regarding a separate and unrelated offense. Mathis v United States, 391 U.S. 1 (1968). Numerous decisions of this Court have made it clear that the Fifth Amendment privilege applies to numerous varieties of governmental proceedings and that a person to whom possibly self-incriminatory questions are put may remain silent rather than speculate as to the efficacy of suppression at a later date. See, e.g., Maness v Meyers, - U.S. - 42 L.Ed. 2d 574 (1975); Lefkowitz v Turley, 414 U.S. 70 (1973); Kastigar v U.S., 406 U.S. 441 (1972); McCarthy v Arndstein, 266 U.S. 34 (1924).

There is no indication in Wolff, Supra., that the prisoners involved in that matter faced any future criminal prosecutions, and for this reason, the Court of Appeals quite correctly declared that Wolff was not applicable to Palmigiano's situation. The Court spoke of the duties prison officials must discharge when a prisoner faces possible criminal prosecution from a violation of prison regulations:

> They must make it quite clear to an inmate who is under threat of criminal prosecution that while he has a due process right to speak, he is under no compulsion to do so. If the inmate chooses to remain

silent, he must not be questioned further. Moreover, in cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let into the disciplinary proceeding, not because Wolff requires it in that proceeding, but because Miranda requires it in light of future criminal prosecution. Slip Opinion, Petition for Writ of Certiorari, Appendix A, p. 14.

2. The United States Court of Appeals for the First Circuit deferred to Wolff and abandoned its prior holding on "use" immunity.

At Section III, page 8 of their Petition, petitioners suggest that the United States Court of Appeals for the First Circuit has adopted a unique method involving "use" immunity to protect the interests of prisoners at disciplinary hearings. Prisoner Palmigiano respectfully submits that the Court of Appeals for the First Circuit candidly and clearly rejected "use" immunity as a protective devise in the prison disciplinary hearing context:

> ... we now realize that allowing prison officials to coerce testimony where they wish by extending immunity has awesome implications. It cheapens the Fifth Amendment. Immunity could be given where it would be scant recompense for the consequences of coerced testimony. There is also the institutional problem. Since prison officials themselves lack the authority to grant immunity, formal judicial proceedings and a full stenographic transcript would be required. Our prior opinion did not take such considerations into account.
>
> While reaffirming our holding as to appellant, we amend our prior opinion by withdrawing our declaration as to a general right on the part of the prison authorities to compel testimony and a general right on the part of inmates to "use" immunity when they come before disciplinary boards. Slip Opinion, Petition for Writ of Certiorari, Appendix A, p. 13.

VI. Conclusion

Your respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Stephen J. Fortunato, Jr.
McKINNON & FORTUNATO
1168 Newport Ave.
Pawtucket, R.I. 02861

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1187

JOSEPH BAXTER, et al.,
PETITIONERS,

v.

NICHOLAS A. PALMIGIANO,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

JULIUS C. MICHAELSON
Attorney General
RONALD A. DWIGHT
Special Assistant
Attorney General
250 Benefit Street
Providence, Rhode Island 02903
(401) 831-6850

July 24, 1975

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Kadish, *The Advocate and the Expert — Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803 (1961) 17
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Regulations Governing Disciplinary, Classification, and Mail Procedures for All Inmates at the Adult Correctional Institutions, State of Rhode Island (*Morris Rules*) ..... passim

In the Supreme Court of the United States

October Term, 1975

No. 74-1187

JOSEPH BAXTER, et al.,
PETITIONERS,

v.

NICHOLAS A. PALMIGIANO,
RESPONDENT.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals is reported at 510 F.2d 534 (1974) and is also reproduced in Appendix "A" to the Petition for Writ of Certiorari.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered December 20, 1974 and appears as Appendix "A" to the Petition for Writ of Certiorari. The Petition for Writ of Certiorari was filed on March 19, 1975 and was granted on June 9, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Constitutional Provisions and Rhode Island Regulations Involved

Article V of the Amendments to the United States Constitution provides in pertinent part as follows:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

Article VI of the Amendments to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article XIV, Section 1 of the Amendments to the United States Constitution provides in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provisions of the "*Morris Rules*" pertaining to prison disciplinary hearing within the Adult Correctional Institutions of the State of Rhode Island and Providence Plantations are set out in the Appendix at pages 199-208 and are also reported at 310 F. Supp. 857, 865-75 (D.R.I. 1970).

Questions Presented

1. Whether the V, VI, and XIV Amendments to the Constitution of the United States, and the principles laid down in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), require that a prisoner confined under sentence for conviction of a crime be entitled to the presence of defense counsel at a prison disciplinary hearing where the infraction may also be the subject of criminal prosecution?
2. Whether the V and XIV Amendments to the Constitution of the United States require that "use immunity" be granted to a prisoner at a prison disciplinary hearing if an inference of guilt is drawn from his remaining silent.

Statement of Facts

The precise form of disciplinary hearings in the Rhode Island Adult Correctional Institutions (ACI) have been the subject of litigation since 1969 when a suit brought under 42 U.S.C. § 1983 demanded that Rhode Island afford its convicts a complex system of procedural due process

as a condition precedent to disciplinary punishment or rehabilitative classification. The final outcome of this litigation was a code of prison disciplinary rules, the *Morris Rules* adopted by agreement of both sides on March 10, 1970. *Morris* v. *Travisono*, 310 F. Supp. 857, 865-75 (D.R.I. 1970),[1] A. 203.

A brief perusal of the rules relating to disciplinary procedures will show that they provide an orderly and fair procedure for the efficient disposition of disciplinary cases. Inter alia, they provide that inmates charged by guards with serious rule infractions are entitled to a written charge by the reporting officer, an independent investigation by a superior officer, prior written notice, a hearing before an impartial disciplinary board, lay counsel, the right of confrontation and cross-examination ("except where the Board determines that an informant's identity must be protected" (A. 207)), and a decision "based upon substantial evidence." A. 208. Tape recordings of the hearings may be made by the inmate upon his own recorder. There is, in addition, a right of appeal to the Warden with provision for submission of objections. Where the infraction may also be the subject of criminal prosecution, the following provision applies to the initial investigation:

> I. Whenever an inmate is charged with an institutional violation which may be the subject of criminal prosecution, the written notice referred to in paragraphs E and F above shall so notify the inmate, and advise him that although statements he makes in his defense at a disciplinary hearing are probably not admissible for affirmative use by the prosecution at a trial, he may wish to consult an attorney to determine what action to take. [A. 206]

[1] The *Morris Rules* have received much favorable comment. See, e.g., Milleman, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 Md. L. Rev. 27, 37-38 (1971).

This particular case arose from an incident which occurred on the night of November 11, 1972. The respondent, Nicholas A. Palmigiano, was then and is presently serving a life sentence for murder at the ACI. That day it appeared to Palmigiano that a fellow prisoner was seriously ill. A. 201. The guards on duty, in view of all the circumstances, reacted orderly by calling the Rhode Island Medical Center. A. 200. Because the maximum security unit of the ACI at that time held less than two hundred men, medical help had to be summoned from the nearby Rhode Island General Hospital. A delay ensued. Ten minutes before the regular nightly lock-up which interfered not even slightly with the ensuing medical assistance, Palmigiano went about advising other prisoners not to return to their cells for the 9:00 P.M. lock-up as a protest against the failure to provide immediate medical attention. At that point guards, pursuant to the *Morris Rules*, charged Palmigiano with "inciting a disturbance and disrupt [sic] of A.C.I. operations, which might have resulted in a riot." A. 197. Formal written notice followed, and Palmigiano was summoned before the disciplinary board. Palmigiano was informed that evening by Capt. Brule that criminal charges might be brought against him and that he should contact his attorney. A. 37.

Prior to entering the hearing room, Palmigiano was permitted to consult with his retained attorney and was then advised by Deputy Warden Remillard that while he had a right to remain "mute . . . it will be detrimental to your defense." A. 43. At the hearing itself, Palmigiano had the assistance of one Flint, authorized by the Warden and Assistant Director for Correctional Services to assist inmates at disciplinary hearings pursuant to *Morris Rule*

II (G).[2] A. 189. Written notice of the charges had been given to Flint as representative of the National Prison Reform Association in accordance with an understanding between the Warden and the inmates in effect at that time. A. 38, 185. Flint was then to and in fact did notify Palmigiano of the charges against him. A. 185. Palmigiano was informed at the hearing that the *Rules* did not permit the presence of either a retained or appointed attorney but that inmate substitute counsel would be permitted. A. 46, 186. Relying upon the written report of the reporting officer, the Board found Palmigiano guilty of the charged infraction and disciplined him to thirty days punitive segregation and recommended that his classification be degraded.[3] A. 46. Palmigiano exercised his right to appeal the determination of the disciplinary board to the Warden, but upon review the determination was upheld. A. 187.

Travel of the Case

Palmigiano thereafter filed suit under 42 U.S.C. § 1983 in the United States District Court for Rhode Island. His complaint (A. 6) alleged deprivation of procedural due process for failure of the *Morris Rules* to provide for appointed or retained counsel at the disciplinary hearing. After a full hearing on the merits, the District Court concluded that procedural due process had been accorded to Palmigiano at the disciplinary hearing. The Court found

[2] Inmates are presently assisted by classifications officers and not by other inmates in accordance with *Morris Rule* II (E). A. 206.

[3] *Palmigiano* v. *Baxter*, 487 F.2d 1280, 1282, footnotes 1-3 (1st Cir. 1973) (*Baxter I*) or A. 213, for a complete description of the various penalties available to the Board.

the following facts: Palmigiano was fully advised prior to the hearing of the infraction of the *Rules*; he had an opportunity to advice of counsel concerning the charge; he was aided by counsel-substitute during the hearing; the charge was read to him at the hearing; he was given the opportunity to explain his actions; he was informed of the evidence against him; he had an opportunity to call witnesses, which he did not exercise. Finally, the Court found the determination of the Board based upon substantial evidence. A. 189-90. It should be noted that no question of subsequent use immunity was raised in the District Court, because Palmigiano said nothing which could have been used against him in any subsequent criminal proceeding.

The judgment of the District Court was reversed on appeal, *Palmigiano* v. *Baxter*, 487 F.2d 1280 (1973) (*Baxter* I), A. 213 *et seq.*, the Court of Appeals for the First Circuit holding that "appellant was denied due process in the disciplinary hearing insofar as he was not provided with use immunity for statements he might have made within the disciplinary hearing, and because he was denied access to retained counsel during the hearing." 487 F.2d at 1292; A. 235. The Attorney General of Rhode Island thereafter filed a petition for writ of certiorari which was granted. 418 U.S. 908 (1974); A. 237. This Court vacated the judgment in *Baxter I, supra,* and remanded the case to the circuit court for reconsideration in light of this Court's opinion concerning due process requirements at prison disciplinary hearings in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

In its second *Baxter* decision, *Palmigiano* v. *Baxter*, 510 F.2d 534 (1974) (*Baxter* II) (Appendix "A" to the Petition for Writ of Certiorari), the First Circuit held that where "an inmate is called to a disciplinary hearing under the circumstances present here, and is informed

that his silence will be used against him, or indeed where his testimony is compelled, use immunity must be provided and the inmate must be so informed." 510 F.2d at 536; Appendix "A" at 11. More importantly, the Circuit Court reconsidered its holding that retained counsel be required at disciplinary hearings as follows:

> We now alter what we said concerning the remaining issue, the right to counsel, confined to a situation where future prosecution is contemplated. Again the *Wolff* ruling does not directly apply. This particular problem is more akin to that presented in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), where the Court was concerned with "circumstances surrounding in-custody interrogation [which] can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators." 384 U.S. at 469-70. *Mathis*, *supra*, applied *Miranda's* reasoning to those already in prison. It follows, therefore, that the *Miranda* solution must be foremost in the minds of prison administrators. They must make it quite clear to an inmate who is under threat of criminal prosecution that while he has a due process right to speak, he is under no compulsion to do so. If the inmate chooses to remain silent, he must not be questioned further. Moreover, in cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let into the disciplinary proceeding, not because *Wolff* requires it in that proceeding, but because *Miranda* requires it in light of future criminal prosecution. [510 F.2d at 537; Appendix "A" at 13-14.]

Because the State believes that the entire question of counsel at prison disciplinary hearings was decided by

this Court in *Wolff* v. *McDonnell*, *supra*, a second Petition for Writ of Certiorari was filed on March 19, 1975.[4] The Petition was granted on June 9, 1975, and the case set down for oral argument in tandem writ *Enomoto* v. *Clutchette*, No. 74-1194.

Summary of Argument

I. Every aspect of this Court's decision in *Wolff* v. *McDonnell*, *supra*, indicates that it was intended to apply to disciplinary hearings in general and not only to disciplinary hearings for infractions which are minor and not punishable as crimes. This is shown by the fact that several of the members comprising the class in *Wolff* had committed crimes and by the Court's specific citation of *Baxter I* in footnote 20, 418 U.S. at 573.

II. The right to counsel at a disciplinary hearing must be found in the due process clause of the Fourteenth Amendment and not in the Sixth Amendment. An application of the step-by-step weighing analysis of cases such as *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961), gives the same result reached in *Wolff*. Where an infraction is also a crime, the argument for swift discipline is even stronger.

III. The incommunicado interrogation which underlies *Miranda* v. *Arizona*, 384 U.S. 436 (1966) has no parallel in a *Morris Rules* disciplinary hearing. In *Miranda* this Court encouraged the States to continue their search for other ways to protect the right against self-incrimination. The *Morris Rules* are such a means and adequately fulfill the purposes of *Miranda* without the presence of counsel at a disciplinary hearing.

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[4] The District Court in Rhode Island in *Roberts* v. *Taylor*, 390 F. Supp. 705 (1975), followed the dictates of *Baxter II* by requiring the grant of use immunity and the presence of counsel at the disciplinary hearings of two previously indicted inmates. The State has prepared a petition for writ of certiorari in *Roberts*, *supra*, requesting that it be considered with *Baxter* v. *Palmigiano*, No. 74-1187.

IV. There is no constitutional prohibition against a disciplinary board making the logical inference of guilt from the failure of an inmate to deny charges, as long as there is other substantial evidence upon which to base its decision. There is no necessity to grant use immunity for any statements made by an inmate at a disciplinary hearing for an infraction which is also a crime, since the choice which must be made is more akin to that made in *McGautha* v. *California*, 402 U.S. 183 (1971) than in *Simmons* v. *United States*, 390 U.S. 377 (1968).

Argument

I. The Court of Appeals Erred in Stating That *Wolff* v. *McDonnell* Does Not Apply to the Prisoner Before a Disciplinary Board Who Has Committed an Infraction Which May Also Be Punishable as a Crime.

Nothing in this Court's opinion in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), indicates that its teaching is limited to prison disciplinary hearings for simple infractions not also punishable as crimes. Every aspect of *Wolff* indicates that *all* types of disciplinary hearings were before the court.

To begin, the facts of *Wolff* v. *McDonnell*, as set forth in the District Court's opinion, 342 F. Supp. 616, 626-27 (D. Neb. 1972), comprise both simple infractions of prison rules and more serious behavior which might also be the subject of further criminal prosecution. *Wolff* was a class action and included among its plaintiffs inmates disciplined for "insurrection" (Plaintiff Botts), threatening to kill an officer (Plaintiff Jackson), assault (Plaintiff Montgomery), and drunkenness (Plaintiff Flynn). Such misconduct may also have been punishable as a crime.[5]

[5] See, Neb. Rev. Stat. §§28-411, 28-413, 28-441, 28-445, 28-735, 28-743 (1971).

In this Court's opinion in *Wolff*, there is extensive language to indicate that the whole range of prisoners' infractions was before the Court. Footnote 5, 318 U.S. at 545, reads in part as follows:

> At the time this litigation was commenced, the statute gave examples of "flagrant or serious misconduct" — "assault, escape, attempt to escape." Neb. Rev. Stat. § 83-185 (1971). This was the definition employed by the District Court in deciding that certain offenses were not serious within the meaning of the Act. See n. 2, *supra*. The statutory change does not affect the issues in this litigation.

The fact that the District Court in *Wolff* decided that an infraction was not "flagrant or serious misconduct" in no way foreclosed the State of Nebraska from criminal prosecution of those inmates who had engaged in criminal conduct. In addition, this Court in *Wolff* indicated that the entire range of disciplinary action was before it when it stated as follows:

> The statute provides for a range of possible disciplinary action. "Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term . . . be forfeited or withheld and also that the person be confined in a disciplinary cell." [418 U.S. at 546-47.]
>
> As the statute makes clear, there are basically two kinds of punishment for flagrant or serious misconduct. The first is the forfeiture or withholding of good-time credits, which affects the term of confinement, while the second, confinement in a disciplinary

cell, involves alteration of the conditions of confinement .If the misconduct is less than flagrant or serious, only deprivation of privilege results. [418 U.S. at 547.]

Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. [418 U.S. at 554-55.]

These quotations as well as frequent references to "good-time credits" throughout the opinion indicate that the more serious criminal conduct as well as lesser infractions were considered by this Court in *Wolff, supra.*

More importantly, specific language in this Court's opinion in *Wolff* on the counsel question actually refers to *Baxter I* and indicates that this Court's decision was intended to resolve the presence of counsel question in a different manner than had been done in *Baxter I* and in *Clutchette* v. *Procunier,* 497 F.2d 809 (9th Cir. 1974), *modified and aff'd on rehearing,* 510 F.2d 613 (1975), *cert. granted sub nom. Enomoto* v. *Clutchette,* 33 U.S.L.W. 3641 (June 9, 1975):

The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. *There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held.* At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings [418 U.S. at 570. (emphasis added).]

It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the needs of the institution.[20] [418 U.S. at 572.]

Footnote 20, significantly, states as follows:

[20] The Courts of Appeals, which have ruled on procedures required in prison disciplinary proceedings, have been split . . . As to counsel, two Circuits have held that there is no right, even to lay substitutes, *Braxton* v. *Carlson, supra; Sostre* v. *McGinnis, supra,* while the Third Circuit, *Meyers* v. *Alldredge, supra,* has held that there is no right to counsel where counsel-substitute is provided. The First Circuit, *Baxter* v. *Palmigiano, supra,* holds there is a right to retained counsel, even where a staff-assistant is available, while the Ninth Circuit, *Clutchette* v. *Procunier, supra,* envisions some sanctions ot disciplinary proceedings calling for provision of counsel, and *has determined that counsel must be provided where a prison rule violation may be punishable by state law* . . . . [418 U.S. at 572-73. (emphasis added).]

Despite the clarity of this holding, and even the citation of *Baxter II* and *Clutchette* v. *Procunier, supra,* the First Circuit stated on the right to counsel issue that "the *Wolff* ruling does not directly apply"! *Baxter I,* 510 F.2d at 537, Appendix "A" at 13. There is nothing, however, in this Court's language to indicate that the above quoted language is intended to apply only to disciplinary hearings for infractions not also punishable as crimes. On the contrary, the citation of *Procunier* clearly indicates that the *Miranda* based solution of the Ninth Circuit was specifically

rejected as inappropriate to the disciplinary setting. Neither *Baxter* nor *Procunier* were considered by this Court to be "a reasonable accommodation between the interests of the inmates and the needs of the institution." 418 U.S. at 572.

II. Neither the Sixth Nor the Fourteenth Amendments of the Constitution Require the Presence of Counsel at Prison Disciplinary Hearings Where the Infraction May Also Be Punishable as a Crime.

If it is assumed, *arguendo*, that the teaching of *Wolff* is limited to disciplinary hearings on minor infractions, a brief constitutional analysis will show that there is also no requirement for counsel at disciplinary hearings for more serious infractions in either the Sixth or the Fourteenth Amendments.

The right to counsel is embodied in the Sixth Amendment. The exact language provides as follows:

> In all *criminal prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. [emphasis added.]

From the language of the provision, it can be seen that "the Sixth Amendment by its terms governs only 'criminal prosecutions'." *Hyser* v. *Reed*, 318 F.2d 225, 237 (D.C. Cir.) *cert. denied sub nom. Jamison* v. *Chappell*, 375 U.S. 957 (1963). The Supreme Court has consistently held that the Sixth Amendment applies only to "critical stages" of a *criminal prosecution*. *United States* v. *Ash*, 413 U.S. 300 (1973); *Argensinger* v. *Hamlin*, 407 U.S. 25 (1972); *Coleman* v. *Alabama*, 399 U.S. 1 (1970); *Massiah* v. *United States*, 377 U.S. 201 (1964); *White* v. *Maryland*, 373 U.S. 59 (1963); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963);

Hamilton v. *Alabama*, 368 U.S. 52 (1961); *Powell* v. *Alabama*, 287 U.S. 45 (1932). The clause was specifically made applicable to the states by *Gideon* v. *Wainwright*, *supra*. Other parts of the Sixth Amendment have also been made applicable to the states through the due process clause of the Fourteenth Amendment, but only in the context of a criminal prosecution. *Duncan* v *Louisiana*, 391 U.S. 145 (1968) (right to trial by jury); *Washington* v. *Texas*, 388 U.S. 14 (1967) (right to compulsory process); *In re Gault*, 387 U.S. 1 (1967) (juvenile criminal proceeding); *Pointer* v. *Texas*, 380 U.S. 400 (1965) (right to be confronted by witnesses); *Klopfer* v. *No. Carolina*, 386 U.S. 213 (1967) (speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (public trial). The Sixth Amendment, therefore, does not require the presence of counsel at prison disciplinary hearings, because "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. Cf *Morrissey* v. *Brewer*, 408 U.S. at 488." *Wolff*, 418 U.S. at 556.

While the Sixth Amendment has no application, the Fifth Amendment privilege against self-incrimination certainly applies. "[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. . . ." *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966). Since the Fifth Amendment, made applicable to the states in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), itself contains no right to counsel, any right to counsel at prison disciplinary hearings for criminal infractions must be found in the more vague right of due process of the Fourteenth Amendment. The question therefore becomes whether the due process requirement of the Fourteenth Amendment, by its

terms applicable to the states, requires the presence of counsel by itself or in aid of the Fifth Amendment right against self-incrimination. Cf. *Miranda, supra,* at 444.

In deciding whether the Fourteenth Amendment by itself [6] requires the presence of counsel at disciplinary proceedings for criminal infractions, one must make the step-by-step weighing analysis utilized in such cases as *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 (1961); *Hannah* v. *Larche,* 363 U.S. 420 (1960); and *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123 (1951). The State here argues that this type of analysis was made in a careful and extensive manner in *Wolff* and does not need extensive repetition. The Court carefully made a "determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria Workers* v. *McElroy, supra,* at 895. All of the factors considered in *Wolff* continue to be relevant and *equally compelling* whether a disciplinary board considers a simple infraction of prison rules or more serious misconduct also punishable as a crime. While the prisoner has a valid interest in preserving his limited liberty, for the State it continues to be "essential that discipline be swift and sure." *Wolff,* 418 U.S. at 563. *In the case of an infraction which is also a crime, surely the State's interest in swift discipline is even greater than in the case of a minor infraction.* It would be totally illogical were minor offenders subject to immediate and swift discipline while inmates caught with weapons, involved in assaults, etc. were able to make use of the inevitable delays which accompany the presence of lawyers.

"Lawyers [are] masters of the art of frustration, sworn

[6] The Fourteenth Amendment in aid of the Fifth will be considered in the discussion of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), under Argument III, at Brief p. 21, *infra.*

to advance the cause of their client rather than the truth and hence prime instigators of delay and diversion." Kadish, *The Advocate and the Expert-Counsel in the Peno-Correctional Process,* 45 Minn. L. Rev. 803, 838 (1961). Even Justice Marshall in his dissent in *Wolff* agreed somewhat with this observation when he said:

> In view of these considerations, I think it is clear that at least in *those serious disciplinary* cases meeting the *Scarpelli* requirements, see 411 U.S., at 790, any inmate who seeks assistance in the preparation of his defense must be constitutionally entitled to have it. But, although for me the question is fraught with great difficulty, I agree with the Court that it would be inappropriate at this time to hold that this assistance must be provided by an appointed member of the bar. There is considerable force to the argument that counsel on either side would be out of place in these disciplinary proceedings, and the practical problems of providing appointed counsel in these proceedings *may well be insurmountable.* But the controlling consideration for me is my belief that, in light of the types of questions likely to arise in prison discipline cases, counsel-substitutes should be able to provide sufficiently effective assistance to satisfy due process. [418 U.S. at 591-92 (footnote omitted) (emphasis added) [7]]

The State has included in the Appendix (A. 239) a memorandum from a Rhode Island hearing officer pointing out the "delay and very practical problems in providing

[7] A counsel-substitute was provided for Palmigiano, the inmate in this case, as well as the opportunity to consult with his own retained counsel prior to the disciplinary hearing.

It seems unlikely that Justice Marshall in discussing "serious disciplinary cases" would have ignored the requirements of *Miranda* had he thought they had any application. See Argument III, *infra.*

counsel in sufficient numbers at the time and place where hearings are to be held." *Wolff*, 418 U.S. at 570. Following the dictates of *Baxter II*, the State has sought to supply attorneys at all disciplinary hearings involving infractions also punishable as crimes. On March 14, 1975, this involved 27.7% of all pending disciplinary charges.[8] Many inmates refuse appointed counsel, preferring their own. Mr. Donnelly reported as follows:

> [I]t seems that their own attorneys are hard to reach, too busy, etc. and without being able to give notice for forthcoming hearings to these attorneys, I find it impossible to schedule. Once word gets out to the inmates that by requesting their own attorneys to be present, this will become very fashionable to do with inmates wishing to prolong the hearing dates, thus giving the board yet another obstacle. [sic] [A. 239-40.]

It should be noted that this report was prepared on March 14, 1975, long before the granting of certiorari in this case and was thus obviously not prepared specifically for this case.

Further argument against the requirement of counsel is the fact that they are required but not permitted to take an active part in the hearing. *Baxter II* was recently interpreted by the United States District Court for the District of Rhode Island in the case of *Roberts* v. *Taylor*, 390

[8] *Baxter II* requires counsel only where criminal "prosecution is contemplated." Since the grand jury and the attorney general decide whether to indict, application of this *vague* standard requires an attorney whenever an infraction might also be a crime in the judgment of prison authorities, none of whom are attorneys. Prior consultation with the Attorney General in each case to determine whether prosecution is contemplated would cause so much delay that counsel are now supplied in every case where prosecution *might* be contemplated in order not to foreclose a later decision to prosecute.

F. Supp. 705 (D.R.I. 1975). The District Court specifically stated that while *Baxter II* required that the already indicted prisoners have advice of counsel at the disciplinary hearing, counsel would not be permitted to argue for the inmate. 390 F. Supp. at 709. Surely this function could be just as well served by a counsel substitute given the informal nature of these hearings.

Because an infraction involves a crime does not mean that a lawyer is any more necessary to the inmate in defending himself before the disciplinary board. Certainly numerous retained lawyers cannot be permitted to rove through prisons marshalling facts to mount a defense. This can be done without serious institutional problems, however, by an authorized inmate or classification officer acting as counsel substitute. In *Wolff*, this Court required notice to "enable *him* [i.e. the inmate] to marshall the facts and prepare a defense." 418 U.S. at 564 (emphasis added). The Court required no less than 24 hours notice, implying a quick and prompt hearing. Should the hearing be less quick and prompt because a crime is involved? One could go on for many pages weighing the disadvantages of a counsel requirement at disciplinary hearings, but it is apparent that *every reason discussed by the Court in Wolff applies with equal or greater force to the situation where an infraction is also a crime.* Swift and sure discipline, as distinguished from adjudication of criminal guilt, is required. Many if not most of the serious infractions in prison are committed by one prisoner against another, and therefore the weighing of the scale in the interests of discipline is as much for the safety of the inmates as for the benefit of the prison authorities.

When considering the question of right to counsel, it is inappropriate to extend the right granted to persons outside prison to those lawfully incarcerated within the

prison walls. Cf. *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). There is an important and crucial difference between one within and without the prison walls.

> A prisoner is one whose freedom has been intentionally restricted in the interests of the safety of society, his own reform, and a deterrence of misconduct by him or others. While he is not sent to prison for punishment, he has been sent there as punishment. It is not appropriate that he have all the liberties of a free man. [*Nolan* v. *Scafati*, 306 F. Supp. 1 (D. Mass. 1969 (Wyzanski), vacated and remanded, 430 F.2d 548 (1st Cir. 1970).]

While one is entitled as an innocent man to the full panoply of due process rights before being incarcerated, once duly convicted and in prison, one is on notice that further infractions, minor or serious, will be dealt with swiftly and fairly but without the great and history-laden ceremony accompanying one's initial adjudication as a criminal. If those infractions are also crimes, certainly a full trial must follow before an inmate's record is further tarnished by conviction for that crime; but that is apart and separate from the offense of breaking the rules of the institution to which he was constitutionally sent as punishment. We must remember that "we deal here, not with the right of an accord to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee [or as here, an inmate] only because he has been convicted of a crime." *Gagnon* v. *Scarpelli*, 411 U.S. 778, 789 (1973).

III. The Facts and Policy of *Miranda* v. *Arizona* Have No Application to a Prison Disciplinary Hearing Under the *Morris Rules*.

In *Baxter II*, the Court of Appeals stated that the disciplinary hearing for an infraction where future prosecution is contemplated is not covered by *Wolff* but "is more akin to that presented in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), . . ." *Baxter II*, 510 F.2d at 537; Appendix "A" at 13. An analysis of the facts and policy behind *Miranda* show that it has no application to a disciplinary hearing for a criminal infraction under the *Morris Rules*.

All of the cases considered in *Miranda, supra*, contained certain key common features which were summarized by this Court as follows:

> The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney *in a room in which he was cut off from the outside world.* In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—*incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.* [384 U.S. at 445. (emphasis added)]

The key factor here is the *incommunicado interrogation* in a room "cut off from the outside world."

How different is the atmosphere in the disciplinary hearing room at issue here. The *Morris Rules* require (a) oral and written notice in advance, and thus questioning which occurs at the hearing is no surprise to the inmate; (b) timely notice of the right to remain silent;[9] (c) appearance at the disciplinary hearing with the right to assistance of an authorized counsel-substitute, and thus the inmate is never incommunicado;[10] (d) an impartial tribunal, none of whose members reported upon, witnessed, or investigated the alleged infraction, and thus the factor of the "eager beaver" detective seeking another "crime solved" on his record is totally absent;[11] (e) the right to call witnesses and to cross-examine them, further dispelling any atmosphere of "incommunicado interrogation"; (f) the right to tape record the entire proceeding,[12] further guaranteeing the inmate that any strong-arm tactics would be readily available for proof in a subsequent judicial proceeding; and (g) a decision "based upon substantial

[9] At the time of the investigation by the superior officer, the inmate is advised that "although statements he makes in his defense at a disciplinary hearing are probably not admissible for affirmative use by the prosecution at a trial, he may wish to consult an attorney to determine what action to take." *Morris Rules, Disciplinary Procedures*, II(I). A. 206. In addition, at the beginning of the hearing Palmigiano and each inmate is advised that he has a right to remain silent but that his silence will be held against him. A. 207.

[10] In addition to the warnings given in footnote 9, *supra*, presumably the classification officer or authorized inmate assigned as counsel-substitute will advise the inmate of his right to remain silent. Palmigiano and any other inmate charged has an opportunity to consult with his own retained counsel prior to any hearing.

[11] See Chart, A. 241, showing numerous dismissals and not guilty findings at disciplinary hearings.

[12] A tape recording of the entire disciplinary hearing is part of the record in this case, thus giving the Court a unique opportunity to "be present" at the hearing and to observe the total lack of an atmosphere of "incommunicado interrogation." Tape recordings are now made of all hearings by the Board itself rather than by the inmates on their own or borrowed tape recorders.

evidence," which requires independent evidence if an inmate exercises his right to remain silent.[13]

This Court has recently said that "the *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory that custodial *interrogation* is inherently coercive." *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972) (emphasis in original). The type of questioning which goes on in the orderly atmosphere of a prison disciplinary hearing under the *Morris Rule* is not the type of questioning which the Court sought to proscribe in *Miranda*. Rather, there, the Court was concerned with the possibility of "police interrogation [whose effect] was to put the defendant in such an emotional state as to impair his capacity for rational judgment." *Miranda*, 384 U.S. at 465. With advance notice and the assistance of an authorized counsel substitute, there is little possibility that the defendant will lose his capacity for rational judgment. He need simply confer with his counsellor as to whether a course of action is wise.

The requirement of counsel set down in *Miranda* was found "necessary to make the process of police interrogation conform to the dictates of the privilege" "unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, . . ." 384 U.S. at 466, 479. This Court expressly stated that the Congress and the States might devise "potential alternatives for protecting the privilege . . . ." *Id.* at 467. *Miranda* was not intended to apply to *every* situation where an accused is questioned:

[13] While an inference of guilt is made from an inmate's silence, it alone would not be substantial evidence. See discussion in Argument IV, *infra*.

> Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and assuring a continuous opportunity to exercise it, the following safeguards must be observed. [The four *Miranda* warnings follow]. [*Id.* at 467.]

The *Morris Rules* are just such a creative search for a way to provide for efficient prison administration [as distinct from criminal law enforcement] while protecting the privilege against self-incrimination. A set, orderly procedure is set down. Each inmate upon arrival at the ACI is given a copy of the *Morris Rules*. He knows what will happen if he is "booked" with a disciplinary charge, and especially that he is entitled to the assistance of an authorized counsel-substitute in his defense before the disciplinary board. The *Morris Ruls*, we submit, provide for an effective method of apprising the inmate of his privileges and assure a continuous opportunity for its exercise without the necessity of the presence of counsel at the disciplinary hearing. These hearings are not "kangaroo courts," as can be seen from the chart in the Appendix at page 241. Many cases are dismissed for lack of evidence, and the inmate is found not guilty in a substantial portion of the cases. Furthermore, nothing prevents an inmate from consulting with his attorney prior to the hearing by phone or by person should his attorney visit the ACI. In short, the policies which *Miranda* sought to effectuate are

not abandoned by the absence of counsel but guaranteed by a procedure which is "at least as effective" as that devised by the Court in *Miranda*. Furthermore, other policies not considered in *Miranda*, such as efficient prison administration, are simultaneously furthered. Despite the superficial resemblance to a criminal proceeding, we are here concerned with a disciplinary hearing and not with a step in a criminal prosecution. In summary, the setting for the exercise of the Fifth Amendment right against self-incrimination is completely different here, and the procedures for protection of the privilege are adequate.

In applying *Miranda* to the facts of this case, the Court of Appeals in *Baxter II* relied heavily upon *Mathis* v. *United States*, 391 U.S. 1 (1968) which "applied *Miranda's* reasoning to those already in prison." 510 F.2d at 537; Appendix "A" at 14. This statement is only superficially correct and does not provide a basis for the application of *Miranda* to a prison disciplinary hearing as distinct from an in-prison criminal interrogation. The facts of *Mathis* have little resemblance to those here, other than a common prison setting. First of all, *Mathis* repeated the setting of *incommunicado questioning* which *Miranda* sought to infuse with Constitutional guarantees.[14] From the Court's opinion, nothing indicates that the inmate had any assistance whatsoever during his "interview" with the tax agent. Furthermore, the inmate was never advised of his right to remain silent. Most importantly, the agent admitted "his investigation . . would end up in a criminal investigation." 391 U.S. at 4. The application of *Miranda* was deemed necessary in order to effectuate the protection of the Fifth Amendment privilege in the factual situation presented in *Mathis*; this does not mean that *Miranda*

[14] This same incommunicado setting within the defendant's own home provided the main basis for the Court's decision in *Orozco* v. *Texas*, 394 U.S. 324 (1969).

must be applied to the totally different situation of a disciplinary hearing simply because it takes place within the prison walls. The prison setting of the disciplinary hearing is the only common factor between *Mathis* and the case now before the Court. The rationale of *Mathis* was "to give meaningful protection to Fifth Amendment rights." 391 U.S. at 4. Those same rights are adequately protected by the *Morris Rules*.

Although the Court of Appeals mentioned *Miranda* v. *Arizona* in *Baxter I*, 487 F.2d at 1289, A 226, it did so only in the context of the exclusionary rule's suppression of incriminating statements at a subsequently criminal trial. Nowhere in *Baxter I* is there any mention that *Miranda* requires the presence of counsel at all disciplinary hearings where future prosecution is a realistic possibility. In fact the required presence of counsel was specifically rejected in the following passage:

> While we are well aware that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel", *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932), we do not feel that prison disciplinary hearings necessarily require professionally trained counsel. The requirement of professionally trained counsel in all cases could amount to a significant expense for the government, both in supplying counsel for the accused and, because the hearing is likely to become more adversarial as a result, in prolonging the proceeding and making it necessary for the state to be represented by its own attorney. The state is not now represented by a prosecutor within the hearings, nor are formal rules of evidence in force to the extent that a defendant's procedural rights may be lost if not timely raised. Nor is there a jury for whom a defendant's presentation must be made understandable. See *Gagnon* v. *Scarpelli, supra*, 411 U.S. at 789. Moreover, the evidence as to whether the inmate has violated a prison regulation is likely to be simpler, more precise and more readily at hand than in most criminal trials, *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971). While the requirement of legal counsel might be more compelling where the accused, faced with a possible criminal prosecution in the future, had to walk a tightrope between defending himself now and incriminating himself later on, the provision of use immunity eliminates this potentially complicated endeavor. We have no reason to believe that counsel-substitute, of the sort provided for in the *Morris* rules, will not normally provide adequate assistance to an accused inmate within the disciplinary hearing. [*Baxter I*, 487 F.2d at 1291.]

When use immunity was eliminated in *Baxter II*, the Court then characterized the "tightrope" which flows from remaining silent as one of those adverse consequences which is not unconstitutional. Cf. *Flint* v. *Mullen*, 499 F.2d 100 (1st Cir. 1974).

Also relevant to the *Miranda* v. *Arizona* question is the Court's decision in *Gagnon* v. *Scarpelli*, 411 U.S. 773 (1973), heavily relied upon prior to *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), as authority for requiring counsel at disciplinary hearings. *Wolff*, of course, found the observations on the requirements of counsel in *Scarpelli, supra*, as inappropriate to the prison disciplinary setting. It is interesting to note that while the plaintiff in *Scarpelli* had his parole revoked for being involved in and arrested for a burglary, this Court nowhere held that *Miranda* v. *Arizona* thereby required the presence of counsel at his parole revocation proceeding. In fact, the Court observed that it would be

neither "possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements." 411 U.S. at 790. Certainly on the basis of the fact situation presented in *Scarpelli*, this Court would have mentioned that *Miranda* required the presence of an attorney if the possibility of future prosecution were the crucial fact. If *Miranda* has no application to a parole revocation hearing where the parolee faced future prosecution, the reasons are even less compelling for its application to "the very different situation presented by a disciplinary proceeding in a state prison." *Wolff*, 418 U.S. at 560.

IV. A Disciplinary Board May Properly Draw an Inference of Guilt From a Prisoner's Silence at a Disciplinary Hearing, and if Such an Inference Is Made, Need Not Grant Use Immunity For Any Statements the Prisoner May Make.

1. *Silence as Inference of Guilt.*

Before Palmigiano's disciplinary hearing, he was specifically advised by Deputy Warden Remillard that while he had a right to remain silent, his silence would be considered a factor against him. (A. 43) Is this an impermissible burden on the exercise of Palmigiano's Fifth Amendment right to remain silent? *Baxter II* forbids it.[15]

This Court's decision in *Griffin* v. *California*, 380 U.S. 609 (1965), made clear that the Fifth Amendment in its direct application to the Federal government, and in its

[15] *Baxter II*, 510 F.2d at 536, Appendix "A" at 13.

bearing on the states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by a court that such silence is evidence of guilt. *Id.* at 615. This is black letter law. Nevertheless, whether a jury can yet go on to consider silence as evidence of guilt has not yet been decided. In footnote 6 in *Griffin, supra*, at 615, the Court stated:

> We reserve decision on whether an accused can require, as in *Bruno* v. *United States*, 308 U.S. 287, that the jury be instructed that his silence must be disregarded.

A reading of *Bruno, supra*, shows that its holding rested on a federal statute and not on constitutional grounds. Petitioners have been unable to find any cases which extend this federal requirement to state trials or proceedings. See, *United States* v. *English*, 409 F.2d 200 (3d Cir. 1969). Even the doctrine of *Bruno* is not of constitutional dimension, but rests on 18 U.S.C. §3481.

While there is language in *Malloy* v. *Hogan*, 378 U.S. 1 (1966), forbidding any penalty for exercise of the right to silence, it must be remembered that that opinion was rendered in the context of a criminal prosecution. Here we consider a prison disciplinary hearing. *Baxter II* boldly states that an inmate's silence "may not be used against him at that time [i.e., at the disciplinary hearing] or in future proceedings. *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973); see *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Spevack* v. *Klein*, 385 U.S. 511 (1967)." 510 F.2d at 536-37; Appendix "A" at 13. The cited authorities are, however, clearly distinguishable from the prison disciplinary context and do not stand for the proposition cited. The penalty in *Lefkowitz, supra*, consisted of an obligatory forfeiture of state contracts for five years. In other words, the penalty

was automatic upon exercise of the privilege. Here, the inmate's silence does not necessarily mean being found guilty of the infraction. The chart (A. 241) shows that inmates are often found either not guilty or the charges are dismissed despite the fact that their silence may be used against them. *Spevack* and *Garrity, supra,* present similar situations where the imposition of the penalty is *automatic* upon exercise of the privilege of silence. In addition, in each of these cases, the hearings were held with the express purpose of gathering evidence for a criminal trial. Such is not the case here. None of these authorities stand directly for the proposition that a disciplinary board may not consider silence of an inmate as a factor against him.

While no person should be required to be a witness against himself, common sense tells any person that silence often means inference of guilt. Silence in the face of an accusatory statement, where the accused has understood the statement and where an opportunity to deny exists, is admissible as an admission of guilt. See *Osborne* v. *United States,* 371 F.2d 913 (9th Cir.), *cert. denied,* 387 U.S. 946, *rehearing denied,* 389 U.S. 891 (1967); *United States* v. *Adams,* 470 F.2d 249 (10th Cir. 1972). Cf. *Fowle* v. *United States,* 410 F.2d 48 (9th Cir. 1969). In the informal setting of the prison disciplinary hearing, the board ought to be permitted to make the logical inference that silence is some evidence of guilt.

Certainly, the ACI disciplinary board should not find an inmate guilty of an infraction solely on the grounds that he failed to deny an accusation, and the *Morris Rules* are clear in requiring that the "board decision must be based upon substantial evidence." (A. 208). In this particular case, the direct eye-witness observations of the reporting officer provided uncontradicted extrinsic evidence. Nevertheless, the failure of Palmigiano to testify reinforced

that evidence, and the State maintains that this inference was both reasonable and constitutionally permissible. The disciplinary board based its finding upon extrinsic evidence and upon the failure of Palmigiano to counteract that evidence either by his own testimony or by calling any witnesses, including the single adverse witness.

The policy reasons for permitting a disciplinary board to consider silence as some evidence of guilt were aptly stated by the Court of Appeals in *Baxter I* as follows:

> The right to remain silent in the disciplinary hearing without his silence being used against the inmate would, however, impose a significant burden upon the processes of fact finding within the disciplinary hearing. The hearings are designed to enable inmates to challenge and dispute allegations about their behavior, and to explain "their side of the story".[22] The practical effect of a right to remain silent would be to eliminate such an opportunity, and force the inmate and the disciplinary board to rely exclusively upon the statements of witnesses. Not only would such reliance be time consuming, but it might also prompt inmates "to pit their own resources against correctional staff in ways that challenge institutional solidarity and encourage confrontations in other areas".[23] Moreover, an exercise of the right to remain silent does not impose a significant burden upon the defendant in a normal criminal trial, because of such procedural safeguards as a strong presumption of innocence, a high burden of proof which the prosecution must overcome, and the full right to call witnesses and cross-examine adverse witnesses. Such safeguards, however, do not exist within the prison disciplinary hearing; if they did, the administrative burdens thereby entailed would be significant. Thus, an

inmate's silence is likely to work against him in the disciplinary hearing, because in maintaining his silence he sacrifices his most important defense.

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[22] *See* Lovall and Nelson, *Correctional Management and the Changing Goals of Correction*, in Problems in Criminal Justice Administration 82 (M. Cohn, ed., 1969).

[23] Note, *Bargaining in Correctional Institutions*, *supra*, at 733. [*Baxter I*, 487 F.2d at 1289 (1973).]

These reasons are valid whether the infraction is minor or one also punishable as a crime.

2. *Use Immunity.*

In *Baxter I*, the Court of Appeals permitted silence as evidence of guilt but required use immunity; in *Baxter II*, the Court found both procedures constitutionally defective. The State argues that not only should a prisoner's silence be permitted to be evidence of his guilt of an infraction because of the unique prison setting, but he should not be entitled to receive "use immunity" for any statements he may make. *McGautha* v. *California*, 402 U.S. 183 (1971); *Flint* v. *Mullen*, 499 F.2d 100 (1974).

There may be some question as to whether the State is here permitted to argue against use immunity, in that *Baxter II* in effect does not require it. On the other hand, the teaching of *Baxter I* and *II* together is that use of silence as evidence of guilt requires the granting of use immunity. Thus, assuming that this Court accepts the State's argument that silence may be used as evidence of guilt, it is necessary to show why use immunity should not be granted as a result in the manner of *Simmons* v. *United States*, 390 U.S. 377 (1968). As a practical matter, there are even reasons for the State to argue for the granting of use immunity. A small percentage of prison criminal infractions are actually prosecuted. Use immunity

is considered by some prison officials as a useful tool in forcing the inmate to "fess up" immediately. Nevertheless, as a legal proposition, the State here argues that there is no constitutional requirement that use immunity be granted.

The granting of use immunity in the Palmigiano situation is an impermissible extension of the teaching of *Simmons, supra.* In *Simmons*, this Court held that a rule which required a defendant to testify at a pretrial suppression hearing, in order to assert his Fourth Amendment claims, created an unconstitutional tension with his Fifth Amendment privilege against self-incrimination. As a result, use immunity was granted against use of the testimony given at the suppression hearing at the trial in chief. *Simmons* considered the question of an accused faced with the choice between raising one constitutional right and foregoing another. Here, Palmigiano faced no tension between Constitutional rights. His choice was whether or not to exercise his Fifth Amendment right to remain silent. Palmigiano's decision was little different from that made by any other defendant in any criminal trial.

McGautha v. *California*, 402 U.S. 183 (1971) presents a situation much more akin to that faced by Palmigiano. There the defendant faced the difficult choice of testifying in order to obtain a more lenient sentence and risking self-incrimination or remaining silent and risking a harsh sentence. This Court held that the choice did not unconstitutionally burden the defendant's Fifth Amendment right. Palmigiano faced a similar choice, *viz.*, testify to avoid discipline and obtain a more lenient penalty while risking self-incrimination or remain silent and risk harsher discipline but avoid self-incrimination. Cf. *Brady* v. *United States*, 397 U.S. 742 (1970). The fact that his silence might be used against him is not determinative. In

McGautha, supra, the defendant made his choice in the context of a full criminal trial; Palmigiano's choice was required in a prison disciplinary proceeding where such a procedure is appropriate.

Nothing in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), requires the granting of use immunity in this situation. The Court imposed the exclusionary rule to guarantee certain police behavior to protect the Fifth Amendment right against self-incrimination. Here, as the State has argued above, the *Morris Rules* provide that same protection. Were a disciplinary hearing to be held without the procedural protections required by the *Morris Rules,* with an appropriate warning to the inmate of his right to remain silent, then it would be appropriate for a court of law to apply the exclusionary rule against further use of any testimony given at such a defective disciplinary hearing. Where the *Morris Rules* are scrupulously followed, however, the imposition of use immunity is an *unjustified further penalty upon the State* (and perhaps the federal government) despite its earlier provision of sufficient protections of the Fifth Amendment privilege.

Finally, the granting of use immunity pursuant to *Baxter II* requires that the immunity be announced by prison officials at the disciplinary hearing. These officials themselves lack the authority to grant immunity. The protections is not effectuated, therefore, at trial as in *Miranda,* but by non-attorney correctional officials. The Attorney General of Rhode Island is alone permitted to grant such immunity. Thus the disciplinary hearing will be transformed from a swift, flexible procedure into a formal, quasi-judicial proceeding with full stenographic transcript, attendance of the Attorney General or an Assistant Attorney General, with the delay and expense which inevitably accompany such proceedings.

Conclusion

For the reasons stated, the State of Rhode Island and Providence Plantations respectfully submit that the portions of the judgment below requiring the presence of counsel, forbidding the use of silence as evidence of guilt, and the granting of use immunity be reversed.

Respectfully submitted,

JULIUS C. MICHAELSON
Attorney General
RONALD A. DWIGHT
Special Assistant
Attorney General
250 Benefit Street
Providence, Rhode Island 02903
Counsel for Petitioners

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Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1187

JOSEPH BAXTER, *et al.*,

Petitioners,

v.

NICHOLAS A. PALMIGIANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

STEPHEN J. FORTUNATO, JR.
McKINNON & FORTUNATO
1168 Newport Avenue
Pawtucket, R.I. 02861
(Rhode Island Affiliate,
American Civil Liberties
Union)

McKINNON & FORTUNATO
1168 Newport Avenue
Pawtucket, R.I. 02861

DAVID CARLINER
1511 K Street
Suite 931
Washington, D.C.

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1187

JOSEPH BAXTER, *et al.*,

Petitioners,

v.

NICHOLAS A. PALMIGIANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED

Amendment V of the United States Constitution provides, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . .

Amendment VI of the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused . . . [shall] have the assistance of counsel for his defense."

Amendment XIV of the United States Constitution provides, in pertinent part,:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; . . .

R.I.G.L. (Rhode Island General Laws) 12-17-15 is titled "Compelling Evidence in Criminal Proceedings-Immunity," and provides:

> In any criminal proceeding before the superior court or in any criminal proceeding or investigation before a grand jury, if a person refuses to answer a question or produce evidence of any kind on the ground that he may be incriminated thereby, and if the Attorney General, in writing, requests the presiding justice of the superior court to order that person to answer the question or produce the evidence, the said court in its discretion after notice to the witness may order the person to answer the question or produce the evidence. In deciding such matters the presiding justice shall consider whether the person may be incriminated thereby in some other jurisdiction. After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence. But he may nevertheless be

> prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering or failing to answer, or in producing, or failing to produce evidence in accordance with the order.

R.I.G.L. 11-38-5 is denominated "Incite to riot at correctional institution" and provides:

> Any person who, with intent to cause a riotous assembly at the Adult Correctional Institution, shall incite a riot or a continuance of a riot or destruction of property while rioting, shall, upon being found guilty of said offence, be fined not exceeding ten thousand ($10,000.00) dollars, or shall be imprisoned not exceeding ten (10) years, or both.

R.I.G.L. 11-25-2 is denominated "Assault or escape by a maximum custodial unit inmate" and provides as follows:

> Every prisoner confined in the maximum custodial unit of the adult correctional institutions or in the custody of the warden or other officer while outside the confines of the institutions, who shall assault the warden, or other officer of said institution, or shall escape, or attempt to effect an escape shall be sentenced by the court to a term of imprisonment in the adult correctional institutions for not less than one (1) year no more than twenty (20) years, except where the original sentence was imprisonment for life, said term to commence from the expiration of the original term of such prisoner.

R.I.G.L. 11-44-1 is denominated "Malicious destruction of property or obstruction of lawful pursuits" and provides as follows:

> Every person who shall wilfully and maliciously or mischievously injury or destroy the property of another, or obstruct the use of the property of another, or obstruct another in the prosecution of his lawful business or pursuits, in any manner, the punishment whereof is not specially provided for by statute, shall be fined not exceeding one hundred ($100.00) dollars or be imprisoned not exceeding one (1) year.

The so-called Morris Rules, which governed disciplinary procedure at the Adult Correctional Institutions in Rhode Island at the time of Palmigiano's disciplinary hearing are set out, in pertinent part in Petitioners' Appendix, pp. 203-212. Contrary to the declaration of the Attorney General in his Brief for the Petitioners, p. 3, these rules do not appear in identical form in *Morris v. Travisono,* 310 F.Supp. 857 (DRI 1970), but rather reflect some amendments subsequent to the decision of the United States District Court in that case. In short, the rules as reproduced in the Appendix were in effect at the time of Palmigiano's difficulty in November 1973; the rules as printed in *Morris v. Travisono, supra,* were not.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a prisoner brought before an in-prison disciplinary board to answer to charges based upon allegations that could also give rise to a future criminal prosecution is entitled to the assistance of counsel in order to secure the proper effectuation of his Fifth Amendment privilege against self-incrimination?

2. Is the Fifth Amendment privilege against self-incrimination impermissibly burdened when prison officials inform a prisoner appearing before a disciplinary board that his silence will be considered against him?

3. Whether a prisoner's proper assertion of his Fifth Amendment privilege against self-incrimination at a prison disciplinary hearing may be overcome only by a grant of use immunity?

SUMMARY OF ARGUMENT

Your Respondent, Nicholas A. Palmigiano, incarcerated under sentence of law at the Adult Correctional Institutions, Howard, Rhode Island, argues that a prisoner is entitled to the assistance of counsel when, as here, he is brought before a prison disciplinary board to answer charges for an in-prison infraction arising from a set of facts that could also lead to a future criminal prosecution. Counsel's presence is needed not to cross-examine witnesses or to assist in the presentation of a factual or legal defense but to guarantee the proper effectuation of the prisoner's Fifth and Fourteenth Amendment privilege against self-incrimination. While it may be debatable as to whether Palmigiano may properly advance a Sixth Amendment claim to the assistance of counsel, inasmuch as he had not been formally charged by way of indictment or information, Palmigiano urges that because he was advised that criminal charges were a likelihood he faced interrogation in a custodial situation, he was entitled to at least the Fifth Amendment protection secured by this Court in *Mathis v. United States,* 391 U.S. 1 (1968) and *Miranda v. Arizona,* 384 U.S. 436 (1966). Even had he not been advised that criminal charges might be

preferred against him, a man of reasonable prudence and caution could assume that the in-prison charge of inciting a riot could also lead to a criminal trial in the State courts. *Mathis, supra,* puts to rest any governmental contention that *Miranda, supra,* does not apply in those situations where the person being interrogated is incarcerated for reasons separate and apart from the subject matter giving rise to the custodial interrogation.

It is beyond debate that the Fifth Amendment privilege may be asserted regardless of the situation or proceedings at which government officials seek to elicit information. And because the Fifth Amendment is so fundamental to our jurisprudence, one who seeks its protection cannot have his silence considered as evidence of his guilt, see, e.g. *Ullman v. United States,* 350 U.S. 422 (1956), nor may State officials compel the abandonment of a proper claim of the privilege against self-incrimination except by a grant of use immunity. See, e.g. *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Kastigar v. United States,* 406 U.S. 441 (1972).

The prisoner brought before a prison disciplinary board to face charges of a nature that could also eventually confront him in a criminal proceeding must decide whether to remain silent or exercise his due process right to speak. He clearly needs counsel to assist him in making this delicate decision; and even were immunity to be granted, he needs the assistance of counsel to guarantee that the use immunity grant is a proper and effective one and that questions put to the prisoner subsequent to the grant are not outside its scope.

There is nothing in this Court's decision in *Wolff v. McDonnell,* 418 U.S. 539 (1974) that suggests that the

Constitution requires anything less than the protection Palmigiano seeks. Palmigiano does not in any way press for a modification of this Court's holding in *Wolff*; rather, he suggests that the issue he now raises was not before the Court in *Wolff,* and that it is perfectly logical at this point in time to conduct prison disciplinary hearings according to the guidelines set down in *Wolff,* except in those circumstances, such as presented here, where a criminal prosecution looms as a real possibility for the inmate who is brought before the disciplinary board.

Faced as he was with the real possibility of criminal prosecution for violation of Rhode Island criminal statutes, including but not limited to incitement to a riot and assault, see, p. 3 supra, Palmigiano was clearly entitled to all the protections that this Court has consistently held are available to the criminal suspect.

The United States Court of Appeals for the First Circuit asserted nothing new or novel when it held that a prisoner in Palmigiano's circumstances was entitled to the assistance of counsel and could not be further interrogated in the face of a Fifth Amendment claim. *Palmigiano v. Baxter,* 510 F.2d 534 (1974); Petition for Writ of Certiorari, Appendix, p. 10.[1]

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[1]One theme of the argument advanced by the Attorney General for the State of Rhode Island on behalf of the petitioning prison officials is that lawyers will obstruct the disciplinary proceedings which, according to the Attorney General, are always conducted in a fair and decent manner. (Brief for the Petitioners, pp. 18, 22, 24, 30). In support of this contention, the Attorney General has included in his Appendix, without the agreement of counsel for the respondent, a letter from a prison official and charts regarding the activities of the prison disciplinary board (App. 239-242) none of which was

I.

IN AN ADVERSARY CONFRONTATION BETWEEN A PRISONER AND PRISON OFFICIALS, SITTING AS A DISCIPLINARY BOARD WITH POWERS TO INVESTIGATE FACTS AND METE OUT PUNISHMENT, THE PRISONER MUST HAVE THE ASSISTANCE OF COUNSEL "TO GUARANTEE FULL EFFECTUATION OF [HIS] PRIVILEGE AGAINST SELF INCRIMINATION . . .",[2] WHEN THE SAME CIRCUMSTANCES GIVING RISE TO THE DISCIPLINARY HEARING ALSO EXPOSE HIM TO FUTURE STATE CRIMINAL PROSECUTION.

Inmate Palmigiano submits that *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966) and *Mathis v. United States*, 391 U.S. 1, 20 L.Ed.2d 381 (1968), and not *Wolff v. McDonnell*, 418 U.S. 539, 41 L.Ed.2d 935 (1974), govern the situation in which he found himself. Reviewing this matter after its remand, for considera-

included in the record below. Respondent respectfully suggests that this portion of the Appendix, and references to it in the Brief, be disregarded.

More worthy of consideration is a study of the disciplinary procedures at the Adult Correctional Institutions, Howard, Rhode Island conducted by the Harvard Center for Criminal Justice, "Judicial Intervention in Prison Discipline," 63 J.Crim.L., Criminology and Police Science, 200 (1972). This study does not deal directly with the legal issues before this Court, but it does examine the attitude of prison officials who conduct the disciplinary hearings; the study concludes that the hearing officers are heavily biased toward conviction.

[2]*Johnson v. New Jersey*, 384 U.S. 719, 729, 16 L.Ed.2d 882, 890 (1966).

tion in light of *Wolff, supra*, 418 U.S. 908 (1974), the United States Court of Appeals for the First Circuit declared:

> We now alter what we said concerning the remaining issue, the right to counsel, confined to a situation where future prosecution is contemplated. Again the *Wolff* ruling does not directly apply. This particular problem is more akin to that presented in *Miranda v. Arizona*, 384 U.S. 436 (1966), where the Court was concerned with "circumstances surrounding in-custody interrogation [which] can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators." 384 U.S. at 469-70. *Mathis, supra*, applied Miranda's reasoning to those already in prison. It follows, therefore, that the *Miranda* solution must be foremost in the minds of prison administrators. They must make it quite clear to an inmate who is under threat of criminal prosecution that while he has a due process right to speak, he is under no compulsion to do so. If the inmate chooses to remain silent, he must not be questioned further. Moreover, in cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let in to the disciplinary proceedings not because *Wolff* requires it in that proceeding, but because *Miranda* requires it in light of future criminal prosecution. 510 F.2d 534, 537 (1974) (Petition for Writ of Certiorari, Appendix A, pp. 13-14)

There is no dispute but that Palmigiano was in a custodial situation, confined as he was as the Adult Correctional Institutions, Howard, Rhode Island; moreover, he was removed from the general prison population to a separate room in order to confront the disciplinary tribunal. Nor is there any dispute that

prisoner's counsel was barred from entry into the room, despite Palmigiano's request that counsel be present; and further, it is clear that Palmigiano had been advised, prior to the hearing, that criminal charges might be preferred against him.

In *Miranda, supra,* this Court chronicled at great length the "inherently compelling pressures" that descend upon a criminal suspect in a custodial atmosphere. 384 U.S., at 443-467, 16 L.Ed.2d, at 706-719. These pressures become even more overbearing where, as here, the detainee has been told that his silence will be used against him and the interrogators themselves have the authority to hand out immediate punishment, separate and distinct from that which could follow a later criminal prosecution. Moreover, there was no procedure available to Palmigiano by which he could absent himself from this confrontation.[3]

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[3]Under the so-called Morris rules, in the discretion of the guard who observed the alleged infraction, an inmate charged with a minor infraction may be given the opportunity to elect between an appearance before the disciplinary board and "administrative loss of institutional privileges for a period of up to two nights." Rule 1 (A) (1) provides:

> "If the officer or employee considers the imposition of discipline necessary for a minor offence, he may at his discretion present the inmate with the option of a written charge and subsequent appearance before a disciplinary board, or administrative loss of institutional privileges for a period of up to two nights." App. 203.

Rule V(C) speaks to the consequences one may expect depending upon the course of action a prisoner follows in the face of the choices that may be presented to him regarding a minor violation:

> "...If the right to be granted a hearing for a minor violation is exercised, the disciplinary record must indicate:

The interrogation[4] of Palmigiano behind prison walls is analogous to the situation presented to this Court in *Mathis v. United States,* 391 U.S. 1, 28 L.Ed.2d 381 (1968). There, the Court rejected the government's contention that the holding of *Miranda* was "applicable

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> (1) that the option of loss of institutional privileges for one of two nights has been tendered and refused; (2) if disposition in excess of the aforementioned two days is meted out, the supporting explanation must be included on the record. If the right to a disciplinary hearing is waived, the violation shall in no way appear on the inmates record or upon any record placed before the Parole Board or Classification Board. Records of all such minor violations for which the right to a disciplinary hearing is waived shall be maintained for one year, and a copy shall be given to the inmate when the penalty is imposed." App. 210.

But where, as here, the inmate is accused of a serious violation of prison regulations, no such election is made available to him; the Morris rules mandate dispatch on the part of prison officials to bring the inmate before the disciplinary board. Rules I(B) and (C), II(A), (B), (C), (D), (E), (F). App. 204-206.

When a guard observes a serious infraction he has no alternative but to commence the mechanism which leads inexorably toward the disciplinary board, regardless of the inmate's preferences:

> When an employee or officer considers a written charge and full disciplinary procedures necessary for proper discipline and control, he must show in writing on an inmate violation report form inmate's name, housing work assignment, if applicable; time, date, place and charge; give known details concerning the alleged violation, and sign the report. Rule 1 (D) App. 204.

[4]The Morris rules clearly empower the disciplinary board members with the function of interrogation:

> "The board members may interrogate the inmate and others as necessary." Rule III (C)(3). App. 207.

only to questioning one who is 'in custody' in connection with the very case under investigation." 391 U.S. at 4, 20 L.Ed.2d 381. The principle distinction between the two cases, namely that Palmigiano was told before his interrogation that criminal charges were likely and *Mathis* was not, would seem to put Palmigiano in a stronger posture, for the Rhode Island prison officials cannot be heard to excuse or justify their actions by a claim that they had no idea what their investigation would unearth or that their attention was not riveted particularly to Palmigiano. Palmigiano, as a reasonable man, could have no doubt that the crime had been solved so far as the prison officials were concerned, and hence, his request for counsel.

Palmigiano's situation is enough akin go that which confronted Danny Escobedo, *Escobedo v. Illinois,* 378 U.S. 478, 12 L.Ed.2d 977 (1964); he also asserts a Sixth Amendment right to counsel. But see, *Kirby v. Illinois,* 406 U.S. 682, 689, 32 L.Ed.2d, 411, 417-418 (1972). Unlike Danny Escobedo, Palmigiano caught more than a fleeting glimpse of his counsel, *Escobedo, supra,* 378 U.S., at 480, 12 L.Ed.2d, at 980, but rather by prearrangement he met his attorney at the hearing room door. App. 125. Immediately prior to the hearing, Palmigiano was advised in the presence of his counsel that he could remain silent but that his silence could be held against him. App. 146. This admonition from Deputy Warden Remillard was understandable, albeit unconstitutional, in light of the Morris rules which provide that the inmate "shall admit or deny the charges" preferred against him, Rule III (C) (2), App. 207 but make no provision for the alternative of remaining silent.

Substituting the words "prison officials" for the word "police," the holding of *Escobedo, supra,* appears to be applicable to the matter now before the Court:

> We hold, therefore, that where, as here the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused as been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the constitution as 'made obligatory upon the states by the Fourteenth Amendment' *Gideon v. Wainwright,* 372 U.S. at 342, 9 L.Ed.2d at 804, 93 ALR 2d 733, and that no statement illicited by the police during the interrogation may be used against him at a criminal trial. 378 U.S., at 490-491, 12 L.Ed.2d at 986.

Recognizing that "the Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda,* 'to guarantee full effectuation of the privilege against self-incrimination . . .' " *Kirby v. Illinois,* 406 U.S. 682, 689, 32 L.Ed.2d 411, 417, citing *Johnson v. New Jersey,* 384 U.S. 719, 729, 16 L.Ed.2d 882, 890, 86 S Ct 1772, respondent Palmigiano submits that he was subjected to a confrontation of the type that could well determine his fate before his arrival in the courtroom. *United States v. Wade,* 388 U.S. 218, 235-236, 18 L.Ed.2d 1149, 1162, (1967) See, *United States v. Ash,* 413 U.S. 300, 37 L.Ed.2d 619 (1973).

But whatever the applicability of the Sixth Amendment to a preindictment, pre-trial interrogation by prison officials relative to circumstances surrounding a transaction that is at one and the same time a violation of both prison rules and State law, this Court's decisions leave no doubt that the proper effectuation of the purpose of the Fifth Amendment privilege against self-incrimination during a custodial interrogation requires the assistance of counsel.

When in *Powell v. Alabama,* 287 U.S. 45, 69, 77 L.Ed. 158 (1932), the Court spoke of the "guiding hand of counsel", it recognized that counsel's presence was needed "at every step in the proceedings", not as a mere ornament to satisfy an ancient constitutional mandate, but as an active ally and agent to assist the accused through the maze of evidence and procedure at trial, and apparently at pre-trial hearings as well. See also *Johnson v. Zerbst,* 304 U.S. 458, 462-463, 82 L.Ed 1461 (1938).

Powell, supra, and *Johnson v. Zerbst, supra,* rested primarily upon the Sixth Amendment; however in *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed.2d 694 (1966), this Court clearly declared that the intricacies surrounding the claim of the Fifth Amendment privilege made the presence of counsel imperative:

> . . . the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. . . .
>
> The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercian is reduced, and if coercian is nevertheless exercised the lawyer can testify to it in Court. The presence of a lawyer can also help to guarantee that the accused give a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. 384 U.S. at 459-470, 16 L.Ed.2d, at 721.

More recently, though in the context of a civil proceeding, the Court once again articulated the historic rationale for the inseparable connection between an effective exercise of the privilege against self-incrimination and the presence of counsel:

> The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; and it can be affirmatively waived, or lost by not asserting it in a timely fashion. *Mannes v. Meyers,* 419 U.S. 449, 460, 42 L.Ed.2d 574, 587-588 (1975)[5]

A prisoner in Palmigiano's predicament is even more in need of the assistance of counsel than an accused in

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[5]In his opinion, Mr. Chief Justice Burger of course noted that counsel was "lawfully present" at the civil proceeding under Texas procedure. 419 U.S., at 465, 42 L.Ed.2d, at 587 (fn 14)

Prisoner Palmigiano submits that the reasoning of the Court is equally applicable where, as here, the Court reviews his contention that counsel must be allowed into the disciplinary hearing so that his privilege against self-incrimination will not be "drained of its meaning". 419 U.S., at 465, 42 L.Ed.2d, at 587.

the circumstances that obtained in *Miranda, supra,* for in the matter under review, the prisoner had to confront not only immediate in-prison disciplinary charges but also the specter of a future criminal prosecution. His election to forego his due process right to speak and remain silent was met with a threat that his silence would be considered against him. Further complications present themselves when we consider the ever-present possibility of a lawfully coerced abandonment of the privilege against self-incrimination as a consequence of a grant of "constitutionally imposed use immunity". *Mannes v. Meyers,* 419 U.S. 449, 479, 42 L.Ed.2d 574, 592 (1975) (concurring opinion of White, J.).[6]

[6]The Morris rules contain a provision which directs prison officials to advise the inmate that statements he makes at a disciplinary hearing are protected by something remotely similar to constitutionally imposed use immunity:

> Whenever an inmate is charged with an institutional violation which may be the subject of criminal prosecution, the written notice . . . shall so notify the inmate, and advise him that although statements he makes in his defense at a disciplinary hearing are probably not admissable for affirmative use by the prosecution at a trial, he may wish to consult an attorney to determine what action to take. Rule II (I), App. 206.

Palmigiano was not advised at any time that his statements would not be used against him at any future criminal prosecution; but in any event, it is Respondent Palmigiano's position that a declaration that statements "are probably not admissable for affirmative use by the prosecution at a trial" falls far short of the assurance necessary to overcome a proper invoking of the Fifth Amendment privilege against self-incrimination. More than vague and tentative promises that lead the untutored prisoner into the area of speculation and conjecture are needed to legally compel the abandonment of the "essential mainstay of our adversary system". *Miranda v. Arizona,* 384 U.S. at 460, 16 L.Ed.2d, at 715.

Faced with a number of considerations and options arising out of the confluence of the Fifth Amendment privilege, the due process right to speak, and a potential use immunity grant, the inmate is enmeshed in an area of the law that is perplexing enough for lawyers, let alone an incarcerated lay person, and needs the assistance of counsel for at least five reasons:

(1) To explain the ramifications of invoking the testimonial privilege or exercising his due process right to speak;

(2) To explain to him the effect of a grant of immunity upon the privilege against self-incrimination;

(3) To assure that what the prison officials suggest is a grant of immunity is in fact a grant of immunity for the circumstances that precipitated the disciplinary action and the possibility of prosecution;

(4) To assure that the inmate, through a lack of knowledge, does not remain silent in the face of an immunity grant, thereby exposing himself to additional deprivation of his liberty for contemptuous behavior;

(5) To guarantee that the questions put to the prisoner by his custodians do not overreach the limits of the grant of immunity.[7]

Though formal charges had not been preferred against Palmigiano by way of complaint, indictment, or information, he had been advised by a prison official that criminal charges were a likelihood and that he

[7]This Court has implied that an attorney may sometimes give good faith advice to a client to remain silent even in the face of a grant of immunity; this, of course, would be a rare occurance, but it remains one factor militating in favor of counsel's presence at Palmigiano- and Mathis-type confrontations. *Maness v. Meyers,* 419 U.S., at 462 , 42 L.Ed.2d, at 585 (fn. 10) (1975).

should consult an attorney. Moreover, he was forced into a face-to-face confrontation with government officials, in this case his permanent custodians, who sought to interrogate him, and not merely display or examine his person, see, e.g., *United States v. Wade*, 388 U.S. 218, 18 L.Ed.2d 1149 (1967), and *Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed.2d 411 (1972), or view his photograph. See *United States v. Ash*, 413 U.S. 300, 37 L.Ed.2d 519 (1973).

Kirby v. Illinois, supra, does not in any way attenuate Palmigiano's Fifth Amendment claim to the assistance of counsel in the circumstances under review by this Court, for the decision adhered to the distinction noted in *United States v. Wade, supra,*[8] between statements of a "testimonial" nature and physical characteristics and activities, even speaking, that may serve to identify a person but do not communicate the history of an allegedly criminal event. *Kirby*, 406 U.S., at 687-688, 32 L.Ed.2d, at 416.

Although the primary 'subjective intent of the members of the disciplinary board may well have been

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[8]*Wade* observed that *Miranda v. Arizona, supra,* inserted counsel into custodial interrogations as a guarantor of the implementation of the Fifth Amendment, but went on to note:

> . . . nothing decided or said in the opinions in the cited cases [including *Miranda*] links the right to counsel only to protection of Fifth Amendment rights. Rather those decisions 'no more than reflect a constitutional principle established as long ago as *Powell v. Alabama* . . . .' *Massiah v. United States*, supra, 377 U.S., at 205, 12 L.Ed.2d at 250. It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in Court or out, where counsel's absence might derogate from the accused's right to a fair trial. 388 U.S., at 226, 18 L.Ed.2d, at 1157.

to administer in-prison discipline, with little or none of their attention directed toward the outcome of any future criminal prosecution, one very possible necessary consequence of their inquiry was the eliciting of an incriminatory statement that could well obliterate the prisoner's right to a fair trial and make a guilty verdict a foregone conclusion. No matter how benign the subjective intentions of the prison officials may be, their quest for order and swift discipline within the prison walls remains inextricably entwined with their search for incriminatory statements on the part of the inmate before them.

II.

THE POST-CONVICTION TRILOGY OF *WOLFF V. MCDONNELL*, 418 U.S. 539, 41 L.ED.2D 935 (1974), *GAGNON V. SCARPELLI*, 411 U.S. 778, 36 L.ED.2D 656 (1973) AND *MORRISSEY V. BREWER*, 408 U.S. 471, 33 L.ED.2D 484 (1972) DO NOT IN ANY WAY VITIATE RESPONDENT PALMIGIANO'S CLAIM TO THE ASSISTANCE OF COUNSEL AT A DISCIPLINARY HEARING WHEN THE CHARGES HE WAS CALLED UPON TO ANSWER COULD ALSO GIVE RISE TO A CRIMINAL PROSECUTION.

In the recent past this Court has in *Wolff v. McDonnell, supra, Gagnon v. Scarpelli, supra,* and *Morrissey v. Brewer, supra,* measured the requirements of minimum due process against the claims of those threatened with a restriction of liberty additional to that previously imposed upon them by sentence of a

court of law. In weighing the competing interests and delineating appropriate safeguards, the Court was never asked to rule on the issue presented in the instant matter. There is no suggestion in any of the aforementioned three cases that a prisoner at a probation or parole revocation hearing, or before a prison disciplinary tribunal, ever alleged that the nature and circumstances of the proceeding in which he was involved required that he had the assistance of counsel to secure his testimonial privilege under the Fifth Amendment.

At the outset, it may be noted that in *Morrissey v. Brewer, supra,* the Court expressly did "not reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent". 408 U.S., at 489, 33 L.Ed.2d, at 499.

In *Gagnon v. Scarpelli, supra,* the Court reiterated the principle that except in those cases that clearly require counsel pursuant to the Sixth Amendment and its *per se* rule fashioned in emending decisions, claims for the assistance of counsel should be examined on a "case-by-case approach". *Gagnon, supra,* 411 U.S., at 788, 36 L.Ed.2d, at 665. *Gagnon* went on to declare that counsel should be provided to the probationer or parolee who denies the violation that subjects him to a potential cancellation of his paroleor probation, or when, even in the face of violation, the probationer and parolee faces a complex task procedurally in presenting reasons in justification or mitigation. 411 U.S., at 790, 36 L.Ed.2d, at 666. The matter was, of course, remanded for a further inquiry regarding Respondent Scarpelli's claim for the assistance of counsel, but for the purposes of the case here under review, Scarpelli's

claim, unlike Palmigiano's, was that he needed a lawyer's assistance to help him present a defense showing that a confession made prior to the revocation hearing itself was given under duress, and not because he required counsel's assistance during a custodial interrogation where he would be confronted with difficult decisions and options regarding the Fifth Amendment, use immunity and his due process right to speak. 411 U.S., at 791, 36 L.Ed.2d, at 667.

Similarly, the prisoners in *Wolff v. McDonnell, supra,* did not advance any argument for the assistance of counsel grounded in the Fifth Amendment and *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed.2d 694 (1966), and *Mathis v. United States*, 391 U.S. 1, 20 L.Ed.2d 381 (1968). Nowhere does the decision of this Court or that of the trial court, 342 F.Supp. 616 (D.Neb. 1972), make any reference to such an assertion or suggest that in any way such a claim was under review. Counsel for the petitioning prison officials speculates (Brief for the Petitioner, p. 10) that the alleged misconduct of the prisoners in *Wolff* may have also given rise to criminal sanctions; but again, the issue was not presented and there is nothing in the decision of the trial Court, or of this Court, to indicate that the prisoners in that matter, unlike Palmigiano, were ever threatened with criminal prosecution.

Respondent Palmigiano, then, does not, and in light of *Wolff,* could not, contend for the ingress of counsel into all disciplinary hearings, but merely asserts the very narrow proposition, as did the United States Court of Appeals on remand, 510 F.2d 534, 537, that *Miranda v. Arizona, supra,* and *Mathis v. United States, supra,* have continuing vitality behind both precinct and prison walls. The contention of the Petitioners that prisoners

in Palmigiano-type predicaments are not entitled to counsel is tantamount to asserting that conviction and incarceration consign one a diluted and ineffective version of the Fifth Amendment until one's sentence has been fully served.[15]

[15]The Attorney General of the State of Rhode Island also argues that lawyers should be excluded from disciplinary hearings, even though a criminal prosecution could follow, because they are obstructionists. (Brief for the Petitioners, pp. 16-18). In support of this position, the Attorney General attributes the following statement to Professor Sanford Kadish:

> "Lawyers [are] masters of the art of frustration, sworn to advance the cause of their client rather than the truth and hence prime instigators of delay and diversion." (Brief for the Petitioners, pp. 16-17)

An examination of Professor Kadish's article reveals that he has been egregiously misquoted and his opinion distorted beyond recognition. Professor Kadish, in fact, wrote:

> "On the other hand, some of the apprehension that lawyers would bog down the system is less than real, stemming from the layman's traditional distrust of lawyers as masters of the art of frustration, sworn to advance the cause of their client rather than the truth and hence prime instigators of delay and diversion." Kadish, "The Advocate and the Expert–Counsel in the Peno-Correctional Process," 45 Minn. L. Rev. 803, 838 (1961).

III.

THE PRISON DISCIPLINARY HEARING, BY OPERATING ON THE PREMISE THAT RESPONDENT PALMIGIANO'S SILENCE AT THAT HEARING WOULD BE CONSIDERED AGAINST HIM, UNCONSTITUTIONALLY BURDENED RESPONDENT'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, AND VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

A. The purpose of the Fifth Amendment bars the prison officials in this matter from considering Palmigiano's silence against him.

The petitioning prison officials, in their brief, argue that prison authorities acted within constitutional bounds in advising prisoner Palmigiano that if he remained silent before the prison disciplinary board which was to hear charges against him, his silence would be considered a factor against him, and that the disciplinary board itself acted constitutionally in considering Respondent's silence as some evidence of guilt. (Brief for the Petitioners, 28, 31.) Against this, Palmigiano contends that this procedure violated his Fifth and Fourteenth Amendment privilege against self-incrimination, in that its effect was to force him to choose between speaking with the attendant risk of self-incrimination, and remaining silent only to have his silence serve as a statement of guilt.

It is of no consequence legally that Palmigiano relied on the privilege at a prison disciplinary hearing, for this Court has consistently held that the privilege against

self-incrimination does not depend upon the nature of the proceeding in which the testimony is sought, but may be asserted in any proceeding, be it civil or criminal, administrative or judicial, formal or informal, when the declarant believes the statements could eventually incriminate him. See e.g. *Lefkowitz v. Turley*, 414 U.S. 70, 38 L.Ed.2d 274, (1973); *McCarthy v. Arndstein*, 266 U.S. 34, 69 L.Ed. 158, (1924).

The charges brought against Respondent were to be heard by a prison disciplinary board, which had the power to place Respondent in punitive segregation, and to deprive him of privileges normally available to inmates, including rehabilitative and educational activities, visitation privileges, and reading privileges. (App. 208). To accompany these charges with a threat that guilt would be inferred from silence, violates the historic purpose of the Fifth Amendment "to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime". *Counselman v. Hitchcock*, 142 U.S. 547, 562, 35 L.Ed. 1110 (1892); *Lefkowitz v. Turley, supra.* Respondent Palmigiano faced the constitutionally repugnant dilemma, described by the First Circuit in its initial consideration of this case, "of either remaining silent and risking greater punishment from the disciplinary board or speaking out in his own defense and risking self-incrimination in a subsequent criminal prosecution". *Palmigiano v. Baxter*, 487 F.2d 1280, 1288 (1973); App. 226.

Inmate Palmigiano truly faced "a choice between the rock and the whirlpool". *Garrity v. New Jersey*, 385 U.S. 493, 496, 17 L.Ed.2d 562 (1967). The police

officers in *Garrity*, like Palmigiano, were informed that they might be subjected to future criminal prosecution, and that their silence would be held against them. In *Garrity* the Court found such a procedure unconstitutional, embodying "the antithesis of free choice to speak out or to remain silent". *Garrity v. New Jersey*, 385 U.S., at 498, 17 L.Ed.2d, at 566.

Similar procedures, in which government employees were dismissed from employment because they refused to sign waivers of immunity and to testify after having been called before administrative or grand jury proceedings investigating charges of corruption, were condemned as violative of Fifth Amendment rights in *Gardner v. Broderick*, 392 U.S. 273, 20 L.Ed.2d 1082 (1968), and *Sanitation Men Association v. Commissioner*, 392 U.S. 280, 20 L.Ed.2d 1089 (1968).

A proceeding to discipline a lawyer for professional misconduct was unconstitutional when it imposed, as a price for refusing to provide incriminating testimony or documents, the dishonor of disbarment and deprivation of livelihood. *Spevack v. Klein*, 385 U.S. 511, 17 L.Ed.2d 574 (1967). This Court has also ruled unconstitutional a state statute which cancelled a contractor's government contracts and disqualified him from further transactions with the state, upon the contractor's refusal to waive his right to silence and immunity in state proceedings at which he was questioned about his contracts with the state. The Court held that the threat of such economic sanctions had the effect of unconstitutionally compelling a threatened individual to waive his Fifth Amendment rights. *Lefkowitz v. Turley, supra.*

In the instant case, the prisoner was threatened with thirty days of punitive segregation during which time he

would be locked in his cell twenty-three hours a day, prohibited from mingling with the general prison population, and from participating in work and educational activities; he necessarily faced severe restrictions on visitation and reading privileges. To a prison inmate such deprivation can be as serious a loss as the loss of government contracts might be to a contractor, or disbarment to a lawyer, or public employment to a civil servant. As the Court of Appeals for the First Circuit observed in its initial consideration of this case, "In a prison setting where liberty is by necessity shrunken to a small set of minor amenities, such as work or schooling privileges, visitations and some modicum of privacy, it is likely that any marked change of status which forecloses such liberties will be perceived and felt as a grievous loss.[9] *Palmigiano v. Baxter*, 487 F.2d 1280, 1284, (1973); App. 219.

To be sure, Respondent Palmigiano resisted the proceeding's coercive pressure to testify, as did the attorney in *Spevack v. Klein, supra,* the public employees in *Gardner v. Broderick, supra,* and *Sanitation Men Association v. Commissioner, supra,* and the contractor in *Lefkowitz v. Turley,* supra. Nevertheless, as these cases make clear, a government proceeding is rendered unconstitutional when "the State intend[s] to accomplish what *Garrity* specifically prohibited—to

[9]The First Circuit made this observation in determining that an inmate's stake in prison disciplinary decisions was sufficient to require some due process regardless of any eventual criminal sanctions. However, the observation is equally relevant to the issue of whether Palmigiano's hearing placed him under an unconstitutional compulsion to speak.

compel testimony that has not been immunized." *Lefkowitz v. Turley,* 414 U.S., at 82, 38 L.Ed.2d, at 284. While the Rhode Island prison officials never expressly stated that their purpose was to compel Palmigiano's testimony, Palmigiano submits that the prison authorities' subjective intention, whatever it may have been, does not in any way lessen the coercive effect of informing him that his silence would be held against him.[10] It is the effect of the threat upon the prisoner that is controlling, not the motives or objectives of his interrogators.

The Rhode Island prison officials have sought to distinguish the disciplinary hearing in the instant case from the hearings found unconstitutional in *Garrity v. New Jersey, supra,* and *Spevack v. Klein, supra,* on the grounds that the hearings in those cases were conducted for the express purpose of gathering evidence for a criminal trial. (Brief for the Petitioner, p. 30). Such a distinction is wholly unwarranted, and is based, among other things, on an erroneous characterization of the fact situation described in *Spevack v. Klein, supra.*

Spevack concerned the constitutionality of a hearing to discipline an attorney for his alleged misconduct. There is no suggestion in the language of that decision that any state authority contemplated future criminal prosecution against the attorney. *Spevack,* then, suggests that it is the threat levied against the invoking of the Fifth Amendment privilege, and not a contemplated

[10]The prison officials argue in their brief that "common sense tells any person that silence often means inference of guilt". (Brief for the Petitioner, p. 30).

criminal prosecution, that is the controlling factor. And indeed, since the privilege against self-incrimination attaches except when it is "perfectly clear, from a careful consideration of all the circumstances in the case, that . . . the answer cannot possibly have such tendency" to incriminate. *Hoffman v. United States,* 341 U.S. 478, 488, 95 L.Ed. 1118, 1125, (1951). The function of the privilege would be obliterated if a condition precedent to its exercise were the bringing of formal charges, be they by way of indictment, information or complaint.[11]

Moreover, as the First Circuit observed in its decision prior to the remand of this case, ". . . [S]tate prosecutors are apt to be interested in gathering evidence concerning a wide range of offenses occurring both inside and outside the prison walls, and implicating may prisoners. . . ." Therefore "defendants within a prison disciplinary hearing may have an understandable fear of 'fishing expeditions' designed to gather information". *Palmigiano v. Baxter,* 487 F.2d, at 1289.

In another respect prisoner Palmigiano's circumstances place him in a stronger posture than the individuals who claimed Fifth Amendment protection in *Gardner v. Broderick, supra, Garrity, supra,* and

[11]But even if the constitutionality of the penalty were dependant on some type of official and irrevocable declaration that a future criminal prosecution was likely, Respondent Palmigiano's situation presents a more compelling case for the necessity of Fifth Amendment protections than that under review in *Spevack,* for unlike Attorney Spevak, Palmigiano was expressly informed by prison authorities that the incident on which his disciplinary charge was based might also result in criminal prosecution. (Appendix, p. 184)

Spevack, supra. In *Garrity, supra,* and *Gardner v. Broderick, supra,* state officials sought the testimony of police officers, public employees whose integrity is crucial to state law enforcement. Despite the state officials' legitimate business, even duty, of assessing the loyalty and fitness of such public employees, the Court held that the state could not lawfully dismiss them from employment for refusing to answer questions relating to the performance of their official duties, unless the potential for self-incrimination had been eliminated by a grant of use immunity from criminal prosecution. See also, *Sanitation Men Association v. Commissioner, supra.*

And in *Spevack* the attorney's status as an officer of the court did not deny him the protection of the Self-Incrimination Clause so as to render constitutional his disbarment for refusing to testify or produce documents whose preservation was required by court rule. Palmigiano, as a private citizen confined in prison as a convicted felon, owed no such special affirmative duties to the authorities questioning him at the prison disciplinary hearing, making the penalty imposed on his silence even more clearly impermissible than visited upon the civil servants in the aforementioned cases.

The prison officials argue that the prison disciplinary procedure here under review is distinguishable from *Garrity, Spevack* and *Lefkowitz* in that the penalties imposed in those three cases were automatic upon the exercise of the Fifth Amendment privilege, while the penalty imposed on inmate Palmigiano did not follow immediately and necessarily from his silence. Against this, respondent contends that the fact that his silence, immediately upon being exercised, would be held against him by the triers of fact did place an

immediate, unconstitutional burden on his Fifth and Fourteenth Amendment rights. The consequence of his silence was as automatic a penalty as was the procedure found unconstitutional in *Griffin v. California*, 380 U.S. 609, 14 L.Ed.2d 106, reh. den. 381 U.S. 975, 14 L.Ed.2d 730 (1967). There, the failure of the defendant in a criminal trial to take the stand was commented upon by both prosecuting attorney and the court, the court instructing the jury, *inter alia*, that:

> As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify . . . the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorably to the defendant are the more probable. *Griffin v. California*, 380 U.S., at 610, 14 L.Ed.2d, at 107.

This Court held that such comment on the refusal to testify was a remnant of the "inquisitorial system of criminal justice" outlawed by the Fifth Amendment, and was a penalty imposed for the exercise of constitutional rights. *Griffin v. California*, 380 U.S., at 614, 14 L.Ed.2d, at 109-110. It may be noted that comments on the defendant's silence in *Griffin* did not foreclose the possibility of ultimate acquittal by the jury. The trial court instructed the jury only that it was permitted to draw adverse inferences from defendant's silence. Despite this merely permissive language, the court's instructions were held to be an impermissible burden on the defendant's right to remain silent. In contrast to the procedure found unconstitutional in *Griffin*, prison authorities at Palmigiano's disciplinary

hearing stated that his silence would be held against him. It seems then that the penalty imposed on him for his silence was more of a certainty than the guilty verdict returned against the petitioner in *Griffin, supra.*[12]

Palmigiano does not contend in any way that every adverse consequence flowing from an individual's assertion of his right to remain silent is an unconstitutional penalty on that right. Certainly a criminal defendant must often make difficult judgments as to which of two or more alternatives to pursue, and the Constitution does not always forbid requiring that he make a choice. Thus, it is not difficult to imagine that a person who testifies at his trial and obtains an

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[12]In further support of their argument that the penalty imposed on inmate Palmigiano did not automatically follow from his silence, Petitioners refer to a chart which they have incorporated in the Appendix. (Brief for the Petitioners, p. 30, Appendix 241) This chart is in two sections, the first purporting to show the disposition of disciplinary hearings for the period from December 1974 through June 1975, (Appendix 241), and the second purporting to show dispositions for the period from December 1973 through November 1974. (Appendix 242). This chart, however, is not a portion of the record below, and was improperly included in the Appendix, Rule 26 of Rules of the Supreme Court. Moreover, the chart was prepared by a party to the proceedings subsequent to the trial of this matter; and respondent respectfully urges that all references to the chart, and the chart itself be disregarded.

Should the chart be consulted, prisoner Palmigiano submits that although the chart purports to show that some inmates have been found "Not Guilty" by the disciplinary board, there is no indication on the chart that any of these inmates remained silent at their hearings. Thus, even if the chart is an accurate record of the disciplinary hearings at the Rhode Island Adult Correctional Institution, it provides no basis for determining, as Petitioners' contend, that the penalty for remaining silent at a disciplinary hearing is not automatic.

acquittal might regret his earlier decision to remain mute before an administrative tribunal. Recently, this Court, in *McGautha v. California*, 402 U.S. 183, 28 L.Ed.2d 711, (1971), referred to some of the required choices which are constitutionally acceptable. Thus, a defendant can be forced to choose whether to take the stand on his own behalf, thereby exposing himself to cross-examination and possible self-incrimination, or to remain silent, thereby losing his own testimony as part of his defense. He can also be required to make a similar choice when the risk involved in testifying is impeachment by proof of prior convictions.

McGautha itself held constitutionally acceptable a trial procedure that required a defendant to choose between taking the stand in order to testify relevant to the issue of punishment, thereby risking damage to his case on guilt before a jury which had not yet decided that issue, and remaining silent, thereby losing his right to personally present mitigating factors to the jury on the issue of punishment. The Court reasoned that this single verdict jury system could do no more than prevent a defendant from bringing to the jury's attention evidence peculiarly within his own knowledge relating to the issue of punishment, while still affording him opportunity to present extensive background data through other witnesses. In one sense, the decision to be made by the criminal defendant in *McGautha* was no more difficult or risk-laden than the typical strategic choices which are continually made in any criminal trial. This court therefore answered in the negative "the threshold question of whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved". *McGautha v. California*, 402 U.S., at 213, 28 L.Ed.2d, at 729.

The dilemma faced by Respondent Palmigiano in the prison disciplinary proceedings, however, does violence to the purpose of the Fifth Amendment. The criminal defendant in *McGautha*, had he chosen to remain silent, retained the benefit of the presumption of innocence, and did not have his silence considered as evidence of guilt. Inmate Palmigiano was told in effect to relinquish his Fifth and Fourteenth Amendment rights and testify in order to avoid having his silence treated as evidence of guilt. Such a choice appreciably impairs fundamental policies behind the Fifth Amendment privilege against self-incrimination.

One of the basic functions of the privilege against self-incrimination is "to protect the innocent who might otherwise be ensnared by ambigous circumstances." *Slochower v. Board of Higher Education*, 350 U.S. 551, 558, 100 L.Ed. 692, 700 (1956). As this Court has stated:

> Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. *Ullmann v. United States*, 350 U.S. 422, 426, 100 L.Ed. 511, 518, (1956). (dictum)

This basic function of protecting the innocent is severely impaired if an individual's exercise of the privilege is treated, as was inmate Palmigiano's, as evidence of guilt. It is beyond debate that an individual's silence in reliance on his Fifth Amendment privilege may not be used as substantive evidence of guilt. *Grunewald v. United States;* 353 U.S. 391, 1 L.Ed.2d 931 (1957) *Slochower v. Board of Higher*

Education, supra; Johnson v. United States, 318 U.S. 189, 87 L.Ed.2d 704 (1943).

As the Ninth Circuit Court of Appeals has aptly observed, "It would be anomalous indeed if honorable law enforcement officers were required to elaborate upon the traditional fifth amendment warning and advise arrested persons in effect: 'If you say anything, it may be used against you. You have the constitutional right to remain silent, but if you exercise it, that fact may be used against you.'" *Fowle v. United States,* 410 F.2d 48, 54 (9th Circ. 1969)

B. The petitioning prison officials, by claiming the right to infer guilt from silence, violated Palmigiano's Fourteenth Amendment right to due process of law, for notions of logic and fundamental fairness imbedded in the due process clause, as well as common law rules of evidence, forbid such an inference.

The Rhode Island prison authorities contend that the prison disciplinary board should be permitted to infer that Palmigiano's silence was evidence of guilt, because "common sense tells any person that silence often means an inference of guilt". [sic] (Brief for the Petitioners, p. 30). In answer, respondent concedes that silence in the face of an accusation may under certain circumstances, be probative of agreement, 3A J. Wigmore, Evidence 1042 (Chadbourn rev 1970), but declares that these circumstances do not obtain when such silence is maintained by a person in prisoner Palmigiano's situation in reliance on his Fifth Amendment privilege.

An individual's silence in the face of accusation may be probative of his acquiescence only if it would have been natural under all the circumstances for him to object to the assertion in question. *United States v. Hale,* U.S. , 45 L.Ed.2d 99 (1975). In the instant matter, Palmigiano's silence was certainly as consistent with an inference of innocence as with one of guilt.

Prior to the disciplinary hearing, he had been informed by prison authorities that he might face criminal prosecution. The Morris Rules required telling him that his statements at the disciplinary hearing were "probably not admissable for affirmative use by the prosecution at a trial", App. 206, though he was not advised in accordance with this rule nor was he given use immunity at the hearing. Thus, when he appeared before the disciplinary board, Palmigiano had good reason to fear that any statements he made would be used to build a criminal case against him, and could perhaps be used at a subsequent criminal trial. Under such circumstances, it is understandable that he would be unwilling to give testimony which could be used by the Government in building its incriminating chain. For his statements, though consistent with innocence, might nonetheless tend to incriminate. See *Grunewald v. United States,* 353 U.S. 391, 1 L.Ed.2d 931, (1957).

Palmigiano's situation at the prison disciplinary hearing was similar to that of the arrestee in the recent case of *United States v. Hale, supra,* and to that of the witness called to testify before the Grand Jury in *Grunewald v. United States, supra.* Like the arrestee and the witness, Palmigiano knew that he was considered a potential criminal defendant at the time he chose to exercise his privilege to remain silent. Thus it was "natural for him to fear that he was being asked

questions for the very purpose of providing evidence against himself". *Grunewald v. United States,* 353 U.S. at 423, 1 L.Ed.2d at 954. Like both the arrestee and the grand jury witness, Palmigiano was not represented at his disciplinary hearing by counsel. And as with the arrestee and the grand jury witness before their interrogators, Palmigiano's presence before the prison disciplinary board was compelled.[13]

Petitioning prision authorities suggest that silence may be considered some evidence of guilt because of the informal setting of the disciplinary hearing. (Brief for the Petitioners, p. 30) In answer, Palmigiano suggests that whether or not the disciplinary hearing was "informal" has no bearing on the probative weight of his silence. Rather, the factors discussed above, specifically, his compelled attendance at the hearing, the absence of counsel, and most importantly, his status as a potential criminal defendant and the fact that his silence was claimed under the Self-Incrimination Clause, establishes that his silence could not be used to infer guilt.[14]

Additionally, it is worthy of note that in *Grunewald v. United States, supra,* and *United States v. Hale,*

[13]See fn. 3, *supra.*

[14]Nor did the First Circuit in its pre-*Wolff* decision state policy reasons for permitting the disciplinary board to consider Palmigiano's silence as some evidence of guilt, as the Rhode Island prison officials suggest. (Brief for the Petitioners, p. 31) Rather, the extended quote from the court's decision prior to remand, cited in Petitioners' brief at pp. 31-32, when read in context, states policy reasons for granting an inmate use immunity in a prison disciplinary hearing. *Palmigiano v. Baxter,* 487 F.2d, at 1289 ; Appendix pp. 228-229.

supra, this Court rejected the use of defendants' prior silence for the limited purpose of impeaching their testimony at trial. In Palmigiano's case, the prison disciplinary board treated his silence substantively, to infer guilt. Such treatment is even more clearly impermissible than was the use of silence for the collateral purpose of impeachment. The prison disciplinary board, therefore, could not legitimately draw any inferences whatsoever "from the legal assertion by the witness of his constitutional right". *Johnson v. United States,* 318 U.S. at 196-7, 87 L.Ed. at 711, without denying to Palmigiano "the protection of the individual against arbitrary action, which Mr. Justice Cardozo characterized as the very essence of due process". *Slochower v. Board of Higher Education,* 350 U.S., at 509, 100 L.Ed., at 700-701.

IV.

THERE IS NOTHING IN *WOLFF V. MC-DONNELL* THAT SUGGESTS THAT THIS COURT HAS IN ANY WAY ABROGATED THE WELL-SETTLED PRINCIPLE THAT A PERSON MAY NOT BE COMPELLED TO GIVE STATEMENTS INCRIMINATING HIMSELF UNLESS HE RECEIVES A GRANT OF IMMUNITY COEXTENSIVE WITH THE FIFTH AMENDMENT PRIVILEGE.

When the United States Court of Appeals for the First Circuit reviewed Palmigiano's situation prior to *Wolff v. McDonnell, supra,* it sought to strike a balance

between the prisoner's right to be protected from incriminating himself in a criminal prosecution through the use of statements extracted from him at a prior disciplinary board hearing, and the prison officials' concern with order and discipline behind the prison walls. The Court reasoned that a grant of use immunity would accommodate the interests. *Palmigiano v. Baxter*, 487 F.2d 1280, 1289-90 (1973); App. 229. In effect, the Court declared what Palmigiano here submits is the only constitutionally permissible way to allow prison officials to gather information from the mouth of the prisoner; that is, when immunity is given the State officials sacrifice the prisoner's own words as evidence against him at a future criminal prosecution and must rely on independent evidence, if any, at that time, but their immediate interest in disciplining the prison swiftly through information obtained directly from him will be secured.

The court reasoned:

> The provision of use immunity reflects a rational accommodation between the imperatives of the privilege against self-incrimination and the legitimate requirements of prison disciplinary procedures. In order for this immunity to be helpful to the inmate, however, it would be necessary that he be informed of its existence and its consequences at the prison disciplinary hearing. 487 F.2d, at 1290.

The court did not elaborate upon this statement or address the question as to whether prison officials, absent a statute, could grant immunity to a prisoner at a disciplinary hearing, thereby binding the office of the

Attorney General to the prudential decision of the disciplinary board.[16]

There was no discussion of use immunity in *Wolff v. McDonnell, supra,* but on remand from this Court, the Court of Appeals reexamined its original position:

> . . . Since prison officials themselves lack the authority to grant immunity, formal judicial proceedings and a full stenographic transcript would be required. Our prior opinion did not take such considerations into account.
>
> While reaffirming our holding as to [Palmigiano], we amend our prior opinion by withdrawing our declaration as to a general right on the part of the prison authorities to compel testimony and a general right on the part of inmates to use immunity when they come before a disciplinary board. *Palmigiano v. Baxter*, 510 F.2d 534, 536 (1974).

The Court of Appeals, however, did not deviate from the controlling principle:

> An inmate subjected to . . . interrogation is entitled to be advised of his right to remain silent, and cannot be further interrogated should he choose not to speak. His silence may not be used against him at that time or in future proceedings, *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); see *Garrity v. New Jersey*, 385 U.S. 493 (1967);

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[16]Rhode Island immunity statute, R.I.G.L. 12-17-15, set out in full at p. iv, *supra,* clearly does not empower prison officials to grant immunity in return for the abandonment of the testimonial privilege. Only the Attorney General, under the supervision of the Presiding Justice of the Superior Court, may compel testimony in return for the immunity grant.

Spevack v. Klein, 385 U.S. 511 (1967). *Palmigiano v. Baxter*, 510 F.2d, at 536-7.

Thus, Palmigiano now argues to this Court that if a prisoner who is exposed to criminal prosecution may properly invoke the Fifth Amendment privilege against self-incrimination in the face of questioning by a prison disciplinary board, he may not be coerced into speaking by violence or threats of any kind; and he remains secure within the protective ambit of the Self-Incrimination Clause until such time as he receives unequivocal and legally cognizable assurance that his statements may not be used against him in a criminal prosecution. There is nothing in *Wolff v. McDonnell, supra*, that suggests a contrary conclusion, nor does the fact that the Court of Appeals for the First Circuit ultimately concluded that the prison officials lack the legal power to confer immunity in any way suggest that that court was deviating from the principle that only a grant of immunity can force the surrender of a proper Fifth Amendment claim. Indeed, in support of its declaration that a prisoner in Palmigiano's circumstances had an absolute and unconditional right to remain silent and that his "silence may not be used against him at that time or in future proceedings," the court cited a recent immunity decision of this Court, *Lefkowitz v. Turley*, 414 U.S. 70, 38 L.Ed.2d 274 (1973); *Palmigiano v. Baxter*, 510 F.2d 534, (1974).

Palmigiano does not say that he has an absolute right to immunity on demand[17] and that prison officials

[17]One court has reasoned that since the inmate has a right to speak, he must be advised "of the existence and consequence of . . . use immunity." *Avant v. Clifford*, 341 A.2d 629, 655-666 (N.J. 1975). In effect, the New Jersey Supreme Court seems to allow the prisoner to say, "I will give a statement and you will give me use immunity, whether you like it or not."

have the concomitant absolute duty to grant immunity at his request. What he does contend, however, is that he must be granted use immunity in the prison disciplinary board context when he is exposed to future criminal prosecution in order for him to be required to answer the questions put to him. *Lefkowitz v. Turley, supra; Kastigar v. United States*, 406 U.S. 441, 32 L.Ed.2d 212 (1972); *Gardner v. Broderick*, 392 U.S. 273, 20 L.Ed.2d 1082 (1968).

Nor does Palmigiano seek to isolate himself from all adverse consequences that may flow from his remaining silent. Certainly, if he were to receive immunity, and then persist in remaining silent, he could receive in-prison discipline.[18]

[18]A Fifth Amendment claim could not at that time overcome the actions of prison officials. For silence without any lawful basis, Palmigiano could perhaps be charged pursuant to infraction (a) listed under the section entitled Punishable Conduct in the so-called Morris Rules:

> "(A) Disobeying a lawful order of the Department Director, Assistant Director, Warden, Assistant Warden, or any officer or employee of the institution, or any written prison rule. "App. 211 When this Court ruled that the Self-Incrimination Clause of the Fifth Amendment would not allow the dismissal of a policeman solely for his refusal to waive his privilege, it nonetheless noted that if he "had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra*, the privilege against self-incrimination would not have been a bar to his dismissal." *Gardner v. Broderick*, 392 U.S., at 277, 20 L.Ed.2d, at 1086.

The Attorney General for the State of Rhode Island, in his brief on behalf of the petitioning prison officials, submits that considerations of immunity have no place in a Palmigiano-type situation and that it is of no consequence that silence may be used against the prisoner. (Brief for the Petitioners, p. 33). More particularly, the Attorney General argues, citing *Miranda v. Arizona, supra,* that the exclusionary rule will serve as a panacea at a later criminal trial regarding any statements that were unlawfully extracted from the prisoner at the disciplinary hearing. This suggestion, however, overlooks the teaching of this Court that in the area of the Fifth Amendment privilege, a person confronted with an official order to speak may either obey or remain silent and await a later judicial determination as to whether his silence was proper or contemptuous. The person may not be forced to reveal the possibly incriminatory material simply because he will have an opportunity to move to suppress it at trial. As recently as January 1975, this Court observed:

> Compliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error. *Mannes v. Meyers,* 419 U.S. 449 , 460 , 42 L.Ed.2d 574, 584 (1975).

Equally inapposite is the suggestion by the Rhode Island prison authorities that Palmigiano had no more right to use immunity than the criminal defendants in *McGautha v. California,* 402 U.S. 183, 28 L.Ed.2d 711 (1971) had to a bifurcated trial. (Brief for the Petitioners, p. 33). The choices presented in *McGautha* could not in any way lead to the obliteration of an

established constitutional right. The opportunity to give testimony in order to reduce one's penalty if convicted, at issue in *McGautha,* does not in any way enjoy the same constitutional protection as does the right to remain silent in the face of a criminal accusation. *McGautha, supra,* 402 U.S., at 218, 28 L.Ed.2d, at 732-733. Nor does the opportunity to speak on the issue of punishment reside at the very core of the adversarial process, as does the right to remain silent.

Remaining, then, is the subsidiary question as to whether or not, in the absence of a statute, the prison officials themselves may grant immunity to a prisoner in Palmigiano's situation. The United States Court of Appeals for the First Circuit ruled that they could not. *Palmigiano v. Baxter,* 510 F.2d, at 536, (1974). Counsel for your respondent has not been able to find any decisions of this Court that have spoken directly to this question. All of this Court's decisions on the immunity question have involved statutes, and the Court, on at least one occasion, has suggested that the principles embodied in the various statutes granting immunity, such as the seminal Compulsory Testimony Act of 1893, 27 stat. 443, "[have] become part of our constitutional fabric." *Ullman v. United States,* 350 U.S. 422, 438, 100 L.Ed.2d 511, 524 (1956). See also *Brown v. Walker,* 161 U.S. 591 (1896); *Counselman v. Hitchcock,* 142 U.S. 547, 35 L.Ed. 1110 (1892).

It has been suggested that, regardless of the existence of an immunity statute, there is a "constitutionally imposed use immunity", and that upon being advised of same, a witness may perhaps be barred from continuing to assert a Fifth Amendment claim. *Maness v. Meyers,* 419 U.S. 449, 42 L.Ed.2d 574 (1975) (concurring

opinion of White, J.); and indeed, in the instant matter, the applicable prison rules provide that an inmate who is charged with a violation that may also subject him to a criminal prosecution is to be advised that statements he makes in his defense "are probably not admissable for infirmative use by the prosecution at a trial. . .". Rule II (I), App. 206.

Prisoner Palmigiano submits that from an administrative point of view it would probably be more expeditious if the powers of the prison officials regarding the granting of use immunity were clearly delineated by statute, particularly when one considers that a privilege central to the adversarial process is to be relinquished in return for the immunity grant. However, were prison officials to grant use immunity, only to have the Attorney General's office attempt to circumvent the grant at a criminal trial, the accused might find relief in the Due Process Clause of the Fourteenth Amendment to the United States Constitution, for within the executive branch of government the various officials should assume the burden of "letting the left hand know what the right hand is doing or has done". *Santobello v. New York*, 404 U.S. 257, 262, 30 L.Ed.2d 427, 433 (1971) True enough, in *Santobello*, a plea bargain was apparently breached by the same office that had made it; but in matters such as that under review here it would not seem unreasonable to require that law enforcement officials within the same branch of government be bound by each others promises when the promise leads to the abandonment of a constitutional right.

CONCLUSION

Your Respondent, Nicholas A. Palmigiano, respectfully submits that this Court should hold that counsel's presence is permitted at prison disciplinary hearings where the alleged infraction of prison rules could also give rise to a future criminal prosecution, that a prisoner's silence in reliance upon the Fifth Amendment cannot be considered as evidence of his guilt and that a prisoner's proper assertion of the privilege against self-incrimination cannot be overridden except by a grant of use immunity; and that this Court affirm the decision of the United States Court of Appeals for the First Circuit in *Palmigiano v. Baxter*, 510 F.2d 534 (1974).

Respectfully submitted,
Respondent,
NICHOLAS A. PALMIGIANO,
By his Attorneys

STEPHEN J. FORTUNATO, JR.
McKINNON & FORTUNATO
1168 Newport Avenue
Pawtucket, R.I. 02861
(Rhode Island Affiliate,
American Civil Liberties Union)

DANIEL V. McKINNON
McKINNON & FORTUNATO
1168 Newport Avenue
Pawtucket, R.I. 02861

DAVID CARLINER
1511 K Street
Suite 931
Washington, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSEPH BAXTER, ET AL., PETITIONERS

v.

NICHOLAS A. PALMIGIANO

JERRY J. ENOMOTO, ET AL., PETITIONERS

v.

JOHN WESLEY CLUTCHETTE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
RICHARD L. THORNBURGH,
Assistant Attorney General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
JEROME M. FEIT,
GEORGE S. KOPP,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1187

JOSEPH BAXTER, ET AL., PETITIONERS

v.

NICHOLAS A. PALMIGIANO

No. 74-1194

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JOHN WESLEY CLUTCHETTE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will discuss the question whether the Due Process Clause requires prison disciplinary hearings to be conducted with trial-type procedures

more formal than those enunciated by this Court in *Wolff* v. *McDonnell*, 418 U.S. 539.

INTEREST OF THE UNITED STATES

In *Wolff* v. *McDonnell*, 418 U.S. 539, this Court resolved many questions concerning the nature and extent of procedural safeguards that the Constitution requires at a prison disciplinary hearing. Similar questions are presented in the instant cases. Although these cases involve directly only the practices of prisons in California and Rhode Island, the Court's resolution of the constitutional issues raised will have a direct impact on the existing practices and procedures for management and control of inmates in all other prison systems, including the federal prison system.

The federal prison population represents approximately one-ninth of the Nation's confined offenders. The Attorney General presently has custody over 23,500 inmates, incarcerated in 50 institutions of various types throughout the country. During fiscal 1975, the Federal Bureau of Prisons conducted approximately 24,000 misconduct hearings at these institutions. Since this Court's decision in *Wolff*, the Bureau has twice modified its hearing procedures; additional efforts to improve these proceedings are ongoing. Resolution of the issues in these cases could have a substantial impact on discipline and control in federal prisons, and a ruling requiring all prison disciplinary proceedings to be conducted according to any particular set of inflexible rules may both seriously interfere with the orderly administration of federal prisons and inhibit the continuing development and revision by the Bureau of its disciplinary procedures.

STATEMENT

No. 74–1187—Baxter v. *Palmigiano*

Respondent, an inmate of the Rhode Island Adult Correctional Institutions, brought a civil rights action seeking injunctive and declaratory relief (pursuant to 42 U.S.C. 1983 and 28 U.S.C. 1343(3)) in the United States District Court for the District of Rhode Island.[1] He alleged that an institutional disciplinary

[1] We believe that there is a substantial question whether No. 74–1187 is properly before the Court. The inmate's civil rights action attacked the constitutionality of the regulations of Rhode Island's Adult Correctional Institutions. These regulations, which were adopted in compromise of the litigation in *Morris* v. *Travisono*, 310 F. Supp. 857 (D.R.I.), apply to all inmates in every state prison and appear to be of statewide applicability. Constitutional challenges seeking injunctions against regulations of statewide applicability must be heard by district courts of three judges (28 U.S.C. 2281). In an exhaustive discussion of the applicability of Section 2281 to due process challenges to prison regulations, the Fifth Circuit, *en banc*, has unanimously held that in situations of this sort a three-judge court must be convened. See *Sands* v. *Wainwright*, 491 F. 2d 417, certiorari denied sub nom. *Gujardo* v. *Estelle*, 416 U.S. 992. Cf. *McCarty* v. *Woodson*, 465 F. 2d 822 (C.A. 10). The First Circuit itself appears to have recognized that challenges to the rules established in *Morris* might require a three-judge district court, although it was not required to reach that question in *Souza* v. *Travisono*, 498 F. 2d 1120, which involved only a challenge to the practices at a single institution. If a three-judge district court was required to hear Palmigiano's case, the judgment of

hearing, which had led to his placement in "punitive segregation," had been conducted in violation of the Due Process Clause of the Constitution because prison officials had not allowed his attorney to be present during the hearing.[2]

the court of appeals should be vacated and the case remanded with instructions to convene such a court.

It may be, however, that because the state's procedures grew out of federal litigation and were embodied in a judicial decree as well as in the State's formal regulations, the single district court had jurisdiction. No apparent purpose would be served by convening three judges to pass upon the adequacy of rules over which the single judge, who approved the settlement, possesses continuing jurisdiction (see *Morris* v. *Travisono*, 509 F. 2d 1358 (C.A. 1)). What is more, a state policy adopted only in compromise of litigation may not be the sort of state policy that must be secured against "improvident doom" at the hands of a single judge. On the other hand, it could be argued that the state's unwillingness to go further without additional judicial compulsion is a policy of statewide applicability, even though not embodied in a formal regulation; see *Sands*, *supra*, holding that a three-judge court must be convened to consider a constitutional challenge to the unwillingness of state officials to have *any* regulations. Perhaps there should have been a three-judge court in the original *Morris* litigation. We do not pursue these arguments further, for the federal government has no independent interest in their resolution.

There appears to be jurisdiction over No. 74–1194. As the court of appeals held when the case was first before it (*Clutchette* v. *Procunier*, 497 F. 2d 809, 811–812), the constitutional challenge was to the procedures in use at only a single prison, and the case was thus properly before the single district judge. See also *Wolff* v. *McDonnell*, 418 U.S. 539, 542, n. 1; *Board of Regents* v. *New Left Education Project*, 404 U.S. 541.

[2] Respondent Palmigiano presently is serving a life sentence for murder. According to the first opinion of the court of appeals (487 F. 2d 1280, 1281–1282), a fellow prisoner became ill during the evening of November 11, 1972. The corrections officer on duty, after visiting the ailing inmate, summoned medical help. A delay ensued while assistance was sought from a nearby hospital. No medical assistance had been provided by 8:50 p.m., and respondent advised the other prisoners not to return to their cells for the 9:00 lock-up, in order to protest the "failure to provide medical attention."

Correctional officers charged respondent with inciting a disturbance which might have resulted in a riot. Respondent was permitted to consult with his attorney before entering the hearing room. The hearing officer advised respondent that he had the right to remain silent, but that his silence would be held against him. Respondent also was advised that his conduct might be a violation of the State's criminal law. Respondent availed himself of the assistance of the counsel-substitute provided by the institution's rules and remained silent. The disciplinary board found that respondent had committed the infraction as charged and recommended that he be placed in punitive segregation for thirty days and that he be considered for possible downgrading in classification.

Following an evidentiary hearing, the district court denied relief. The court concluded that respondent had been afforded due process of law; he had been given notice of the claimed violation, an opportunity to confer with counsel prior to the hearing and to be represented by counsel-substitute before the disciplinary board, an opportunity to explain his conduct, the right to call witnesses, had been informed of the evidence against him, and the decision of the disciplinary board was based on facts rationally determined.

The court of appeals reversed, holding that respondent "was denied due process in the disciplinary hearing only insofar as he was not provided with use immunity for statements he might have made within the disciplinary hearing, and because he was denied access to retained counsel within the hearing." *Palmigiano* v. *Baxter*, 487 F. 2d 1280, 1292 (C.A. 1).

This Court subsequently (418 U.S. 908) granted certiorari, vacated the judgment, and remanded for further consideration in light of *Wolff* v. *McDonnell,* 418 U.S. 539, which had been decided in the interim.

On remand, the court of appeals reaffirmed its prior holding that if the inmate is informed that his silence will be used against him, or if his testimony is compelled, he must be told that any testimony he may give cannot be used against him in subsequent criminal proceedings. The court amended its opinion, however, by withdrawing its previous declaration that prison officials have the authority to compel testimony and (correspondingly) to confer "use" immunity. In its stead, the court held that (Pet. No. 74-1187 App. 13):

> An inmate subjected to such interrogation is entitled to be advised of his right to remain silent, and cannot be further interrogated should he choose not to speak. His silence may not be used against him at that time or in future proceedings.

The court also modified its holding with respect to retained counsel at disciplinary hearings. It held (*id.* at 14):

> * * * [I]n cases where criminal charges are a realistic possibility, prison authorities should consider whether defense counsel, if requested, should not be let into the disciplinary proceeding, not because *Wolff* requires it in that proceeding, but because *Miranda* requires it in light of future criminal prosecution.

No. 74-1194—Enomoto v. *Clutchette*

Respondents, inmates of the California penal institution at San Quentin, brought a civil rights action in the United States District Court for the Northern District of California. They alleged that almost every particular of the disciplinary procedings in that institution violate the Due Process and Equal Protection Clauses.

After an evidentiary hearing, the district court granted substantial relief, holding that the disciplinary procedures employed at San Quentin are constitutionally infirm because they do not provide for adequate notice of the charges, the right to call and cross-examine witnesses, the right to counsel or counsel-substitute, a neutral and detached hearing body, a written finding of facts or a uniform notice of a right to appeal the decision. The court enjoined state officials from conducting further disciplinary proceedings under the procedures then in effect and ordered prison authorities to submit a plan to bring the conduct of disciplinary committee hearings into conformity with the court's opinion. The district court concluded that these procedures must be used whenever violations of prison rules would be punishable by (1) indefinite segregation; (2) increase in the prisoner's sentence; (3) fine or forfeiture; (4) isolation longer than ten days; or (5) referral to local authorities for criminal prosecution. *Clutchette* v. *Procunier,* 328 F. Supp. 767, 784–785 (N.D. Cal.).

The court of appeals affirmed. It modified the judgment to require the procedures to be used, as well, for any "temporary suspension of 'privileges,' by restricting the prisoner's activities to a greater extent than the general prison population" (*Clutchette* v. *Procunier*, 497 F. 2d 809, 815 (C.A. 9)).

The panel granted rehearing to assess the impact of *Wolff* on its decision, and modified its opinion in several particulars. *Clutchette* v. *Procunier*, 510 F. 2d 613 (C.A. 9). While acknowledging this Court's holding that the *Wolff* requirements might not be required in proceedings involving lesser penalties such as the loss of privileges, the court below found that "some process is due to prisoners whose privileges are to be removed" (510 F. 2d at 615). The Court concluded that if an inmate is subjected to a loss of a privilege, he must be given timely notice of the reasons and an opportunity to respond.[3] The court also

[3] The Bureau of Prisons complies with the procedures spelled out by the court of appeals for cases in which an inmate is involuntarily deprived of "privileges." See the Appendices to this brief, *infra*, pages 55–93. Because the Court's holding with respect to "privileges" will not affect the Bureau, we do not address the question at length. In our view, however, the Constitution does not require any particular form of procedures to be accorded in such situations. Cf. *Wolff*, *supra*, 418 U.S. at 571–572, n. 19. The Due Process Clause requires procedural protections only when the government seeks to deprive an inmate of a "liberty" or "property" interest so important that the deprivation amounts to "grievous loss." The Court has carefully identified, in all of its due process cases, both the source of the protected liberty or property interest (see, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564; *Wolff*, *supra*, 418 U.S. at 557–558) and the attributes of that interest that make the deprivation a source of "grievous loss" (see, *e.g.*, *Goss* v. *Lopez*, 419 U.S. 565, 575–576).

It is difficult to understand why ordinary prison "privileges" constitute a protected liberty or property interest. *Roth* held that such interest can be created only by operation of state law and must amount to more than a unilateral expectation that benefits presently enjoyed will continue, unchanged, into the future. If the teacher's expectation of continued employment in *Roth* was neither a liberty nor a property interest, the inmate's unilateral expectation of future enjoyment of minor privileges is neither a liberty nor a property interest. So, too, it is difficult to understand why the deprivation of such privileges is "grievous loss," unless that term has come to mean any loss that qualifies as the loss of a liberty or property interest. The decision of the court of appeals would redact "grievous" from "grievous loss," declaring that all "loss" must be "grievous." We submit that some deprivation of privileges is "de minimis" (as that term was used in *Goss*, *supra*), and that the Constitution does not require procedural trappings to attend administrative decisions about their disposition.

directed that (except in a proceeding for an infraction that is also a crime) prison officials must enter in the record of the proceedings, and make available to the inmate, an explanation of the reasons for any decision to decline to allow an inmate to confront or cross-examine witnesses; failure to give adequate reasons constitutes "prima facie evidence of abuse of discretion" (*id.* at 616). The Court declined to modify its prior ruling (497 F. 2d at 822–823) that a prisoner must be provided with counsel whenever he is required to appear before an institutional disciplinary committee for violation of a prison rule, whenever such alleged violation may also be subject to criminal punishment.

SUMMARY OF ARGUMENT

Wolff v. *McDonnell*, 418 U.S. 539, held that the Due Process Clause of the Constitution requires hearings before serious disciplinary measures can be taken against prison inmates. The Court carefully considered both the interest of the inmate in receiving the benefit of error-free decisionmaking and the needs of the institution in having available methods of discipline that will both preserve order in the closed prison society and, whenever possible, contribute to the rehabilitation of the inmate. Balancing these concerns, *Wolff* concluded that hearings should include notice of charges, the opportunity for the inmate to give his version of events, and a statement of reasons for the decision. The inmate should be allowed to present witnesses and documentary evidence unless doing so would endanger the security of the institution or unduly prolong the hearing. The Court also concluded, however, that the Due Process Clause does not require other procedures sometimes associated with trial-type adversarial hearings, such as confrontation of adverse witnesses, cross-examination, or the right to be represented by counsel.

The courts of appeals in these cases appear to have assumed that *Wolff* left open to further decision all of the types of procedures that it did not hold are required by the Constitution. Accordingly, *Clutchette* held that there is a presumptive right to confront and cross-examine, subject to defeasance only if prison administrators can offer one of four reasons that the court of appeals would find acceptable for denying

the right. Both *Clutchette* and *Palmigiano* held that counsel must be provided to the inmate whenever the infraction of prison rules that had led to his discipline might also be the basis for a criminal prosecution. We submit that these cases misunderstood the nature of *Wolff's* holding; *Wolff* is conclusive not only on the procedures it held that the Constitution requires, but also on the procedures it held the Constitution does not require. The courts of appeals should not undertake to clothe themselves in the discretion *Wolff* left to prison officials, at least in the absence of some evidence that the *Wolff* procedures have provided only illusory protection to the genuine interests of prison inmates.

Should the Court conclude, however, that *Wolff* is not dispositive of this case, we submit that the same considerations that informed *Wolff* should lead the Court now to conclude that the Constitution does not require more formal proceedings prior to the imposition of discipline than those required by *Wolff*. The Bureau of Prisons believes that the far broader requirements imposed by the courts of appeals—the presumptive right to confront and cross-examine adverse witnesses, the related right to full disclosure of all of the evidence of misconduct, and the right to counsel—would undermine the purposes of prison discipline and ignore the unique setting in which it occurs.

Prisons are closed societies of proven lawbreakers under the constant control and supervision of a limited staff. Widespread hostility and frustration make

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the atmosphere frequently tense and volatile. Moreover, inmates who break the "inmates' code" by providing information concerning violations risk reprisals if they are identified. Prison authorities believe that testimonial confrontations between an inmate and staff members or other inmates can be dangerous and should be avoided whenever possible.

The government's interest in prison discipline is not limited to the enforcement of prison rules and the maintenance of security. Rather, such discipline is integrally related to the larger purposes of the institution—rehabilitation of offenders and adjustment of their antisocial tendencies. This relationship calls for substantial flexibility in the disciplinary process, with a wide measure of discretion vested in prison administrators, who are intimately familiar with the inmates and responsible for their rehabilitation and security. Both purposes could be undermined if inmates are free to confront and cross-examine staff members as formal adversaries. Representation by counsel could further interfere with the rehabilitative process by producing undesirable delays in the imposition of sanctions and by shifting the focus of imposition of discipline from rehabilitation to procedural formality.

We submit that these important institutional concerns are more than adequate to counterbalance whatever interest the inmate may have in the limited increment in fact-finding accuracy that might be produced by confrontation and the assistance of counsel. We further believe that, provided certain recognized constitutional procedural minima (spelled out in *Wolff*) are met, prison administrators and the responsible legislative bodies are better suited than courts to strike the proper balance between the competing interests at stake. The courts of appeals gave either no weight or insufficient weight to these institutional concerns.

Both courts also held that counsel was required at the disciplinary hearing, "not because *Wolff* requires it * * * but because *Miranda* requires it in light of future criminal prosecution" (Pet. No. 74–1187 App. 14). We submit that this conclusion misapprehends the source and the scope of this Court's holding in *Miranda* v. *Arizona*, 384 U.S. 436. There is no "custodial interrogation" in disciplinary hearings and therefore no opportunity for interrogating officers to coerce or deceive suspects into abandoning their constitutional rights. Inmates are not questioned in federal hearings unless they volunteer to speak; they can remain silent if they choose. Nor does the hearing constitute custody. Although each inmate is within the custody of the prison, the disciplinary hearing is not a separate custody, for an inmate need not attend his hearing and, if he attends, he is free to leave at any time. The hearing itself is conducted by an impartial hearing officer or officers, and the inmate is entitled to a counsel-substitute. There is simply no private and incommunicado interrogation to which the suspect may be subjected against his will. Because the circumstances that prompted *Miranda* are absent, its remedies should not apply.

What is more, even if the hearing is deemed to constitute "custodial interrogation," it does not follow that

Miranda's prophylactic measures should be extended to such hearings. *Miranda* sought to erect safeguards that would protect the individual's privilege against self-incrimination and his right to counsel at critical stages of a criminal prosecution. But the disciplinary hearing is not part of a criminal prosecution; there is no underlying right to counsel to safeguard, and the inmate, far from having a constitutional "right to remain silent," simply has a privilege to refuse to answer questions that might incriminate him. *Miranda* holds no more than that evidence obtained in breach of its procedures shall not be introduced in a criminal prosecution; it does not compel the use of any particular procedures in a civil proceeding not leading to criminal punishment.

The Bureau of Prisons has been engaged in a continuing process of reevaluation of its procedures; this process reflects a concern with assuring fairness and minimizing the likelihood of arbitrary action, while at the same time remaining sensitive to the special condition of the prision environment. This process has resulted in the evolutionary development of increasingly refined procedures for use in prison discipline, with new procedures being harmonized with the goals of security and rehabilitation. The institution of new procedures ought to be left at this time to prison administrators, rather than being taken over by the courts, as the former are in a far better position to experiment with new procedures in the unique prison setting. The ongoing process should be allowed to continue without being constrained by a Procrustean constitutional

mandate requiring recognition in all prisons of procedural rights not yet widely proven to be desirable or practical.

ARGUMENT

THE PROCEDURES ARTICULATED IN *WOLFF* AMPLY SATISFY THE REQUIREMENTS OF DUE PROCESS IN PRISON DISCIPLINARY PROCEEDINGS

Wolff v. *McDonnell,* 418 U.S. 539, established a number of procedural requirements that would thereafter be required before inmates could be subjected to substantial discipline. These requirements were similar in kind to, although not as extensive as, the procedures required in parole and probation revocation hearings (see *Morrissey* v. *Brewer,* 408 U.S. 471; *Gagnon* v. *Scarpelli,* 411 U.S. 778). Because discipline within the walls of a prison can deprive an inmate of a state-created liberty interest by withdrawing good time credits or by placing him in more restrictive confinement, this Court held that the Due Process Clause requires certain procedures designed to assure sufficient reliability in the fact-finding process leading to the imposition of punishment. But the Court also noted that additional procedures that would cause disciplinary proceedings more closely to resemble criminal trials were not required by the Due Process Clause, and that prison officials were to be accorded discretion to use or not to use additional procedures as they, in the exercise of their informed discretion, judged best (418 U.S. at 563, 566–572). Two vigorous dissents argued that the Court should have gone further and held disciplinary proceedings to the same standards that are required when parole is revoked

(see 418 U.S. at 580–593 (Marshall, J., dissenting); 418 U.S. at 593–601 (Douglas, J., dissenting)).

Even in the light of the Court's express determination that certain choices would be left to the discretion of prison officials, and the dissents' disagreement with that policy, the courts of appeals in these two cases appear to have concluded that *Wolff* left open to later consideration all procedures that it did not hold were required by the Constitution. We disagree with that interpretation of *Wolff* and submit that *Wolff* bound lower courts with respect to the procedures it declined to impose no less than with respect to those it held are required. The courts of appeals usurped the limits of their constitutional powers by undertaking to exercise the discretion *Wolff* left to the responsible prison authorities.

To the extent, if any, that *Wolff* left unsettled the questions on which the two courts below have spoken, we submit that the Court should be guided now by the same considerations that informed *Wolff* itself. We therefore devote this brief to analyzing the underlying issues—we assess the role of discipline in a modern penal institution and weigh the institutional needs against those of the inmates. We substantially track the approach we took in our brief *amicus curiae* in *Wolff* [4] in an attempt to demonstrate why the careful balance of functions struck in that case still is appropriate and permissible under the Constitution.

A. INTRODUCTION

We do not question that it is desirable to have accurate fact-finding in the context of prison disci-

[4] No. 73–679, October Term, 1973.

plinary proceedings, and that is certainly one of the major objectives of the procedures established by the Bureau of Prisons for the conduct of prison disciplinary proceedings. However, the unique conditions of the prison environment and the nature of the interests served by the disciplinary process in that environment require and justify certain differences between those procedures and the procedures that must accompany revocation of probation or parole, notwithstanding that there may be a slightly increased risk of factual mistakes. Moreover, since the impact of prison discipline on the individual, although not unimportant to him, is almost invariably far less grave than the consequences of a criminal conviction or of revocation of parole or probation, more flexible constitutional standards governing the conduct of disciplinary proceedings may be countenanced, particularly as such flexibility serves substantial governmental interests and needs.

While the records in these cases do not reveal all the variations in procedures followed in different jurisdictions in the conduct of prison disciplinary proceedings, it is safe to assume that the *Clutchette-Palmigiano* requirements are not generally observed. Nevertheless, at least with respect to those procedures followed in federal prisons, we submit that constitutional requirements are being fully satisfied. In order to facilitate understanding of the issues, the following table compares the *Wolff* standards and the current procedures of the Bureau of Prisons with the requirements imposed by the courts below.

Cluchette-Palmigiano Procedures **	*Wolff* Procedures ***	Bureau of Prisons Procedures*	
		Disciplinary Segregation, Loss of Good Time, Disciplinary Transfers ****	Other Disciplinary Actions
1. Written notice of the charges.	Written notice of the alleged violation no less than 24 hrs. before appearance before disciplinary committee.	Written notice of the charges no less than 24 hrs. before appearance before the Institution Discipline Committee.	Written notice within 24 hours of the infraction.
2. Opportunity to present witnesses may be limited to prevent repetitiousness.	Inmate is permitted to call witnesses; however, prison authorities have the discretion to refuse to produce witnesses whose appearance may create risk of reprisal or undermine security.	An inmate is permitted to call witnesses, provided that the calling of witnesses will not jeopardize institutional security; repetitive witnesses need not be called and reasons for not calling are documented in the record.	No right to present witnesses.
3. Opportunity to present documentary evidence.	Opportunity to present documentary evidence.	Unavailable witnesses may be asked to submit written statement; other documentary evidence will be received.	Opportunity to present documentary evidence.

Cluchette-Palmigiano Procedures **	*Wolff* Procedures ***	Bureau of Prisons Procedures*	
		Disciplinary Segregation, Loss of Good Time, Disciplinary Transfers ****	Other Disciplinary Actions
4. Privilege of confrontation and cross-examination unless prison authorities specify in writting that the denial was based on concern for reprisals, unmanageability, disruption, or safety of prison personnel.	No right to confront or cross-examine adverse witnesses.	No right to confront or cross-examine adverse witnesses.	No right to confront or cross-examine adverse witnesses.
5. Inmate is entitled to be advised that he has a right to remain silent and cannot be further questioned should he choose not to speak, if the charges may also be the subject of a criminal prosecution.	No warnings with respect to a "right to remain silent."	No warnings with respect to a "right to remain silent."	No warnings with respect to a "right to remain silent."
6. Written statement by the fact-finder of the reasons for its decisions.	Written statement by the fact-finders of the reason for the disciplinary action.	Written statement of the reasons for the actions taken in specific terms.	Inmate will be given a written copy of the decision and disposition.

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Cluchette-Palmigiano Procedures **	*Wolff* Procedures ***	Bureau of Prisons Procedures*: Disciplinary Segregation, Loss of Good Time, Disciplinary Transfers ****	Bureau of Prisons Procedures*: Other Disciplinary Actions
7. Written statement by the fact-finder of all evidence relied upon, which can include only the evidence presented at the hearing.	Written statement by the fact-finder of the evidence relied upon; statement may exclude certain items of evidence when institutional or personal safety are implicated; statement should indicate fact of omission.	Written statement includes a record of the proceedings and the specific evidence relied upon for its decision, unless so doing would jeopardize institutional safety.	Inmate will be given a written copy of the decision and disposition.
8. Right to counsel where violation of the prison rules may also be punishable by state authorities. Right to counsel-substitute in all disciplinary proceedings where inmate is unable competently to handle his case.	No right to counsel; counsel-substitute, in circumstances in which serious sanctions are imposed, where the inmate is illiterate or the complexity of the issue makes it difficult to develop.	No right to counsel; in all cases inmate is offered assistance of a staff member to represent him, who will be chosen by the inmate where feasible.	No right to counsel.

*See Appendix B, *infra*, pp. 60–93.

**See *Clutchette* v. *Procunier*, 497 F. 2d 809, 818–823 (C.A. 9), modified, 510 F. 2d 613 (C.A. 9); *Palmigiano* v. *Baxter*, 487 F. 2d 1280 (C.A. 1), vacated, 418 U.S. 908, modified, 510 F. 2d 534 (C.A. 1).

***See *Wolff*, *supra*, 418 U.S. at 563–572.

****Proceeding before the Institution Discipline Committee concerning serious infractions which may result in disciplinary segregation or transfer, loss of good time, or recommendations to the Board of Parole that an inmate's parole grant be retarded or rescinded are normally preceded by a proceeding before the Minor Dispositions Committee and usually occur where that committee recommends that other than minor sanctions be imposed. See Appendix B, *infra* pp. 70–73. Accordingly, imposition of serious disciplinary measures is usually subject to the procedures in both columns.

As the table shows, all of the *Wolff* standards are met in federal disciplinary proceedings that could result in severe sanctions such as loss of good time or disciplinary segregation.[5] However, both the *Wolff* standards and the procedures of the federal prison system differ substantially from the procedures created by the courts below. Under the requirements of *Clutchette*, there is a presumption in favor of confrontation and cross-examination; it may be rebutted only if prison officials can articulate reasons showing, in the particular case, that it would occasion reprisal, unmanageability, disruption, or endanger the safety of prison personnel. *Clutchette* also precludes the disciplinary committee from considering evidence not presented at the hearing and in the presence of the inmate. Both *Clutchette* and *Palmigiano* direct prison

[5] In the federal system, as in many state systems, prisoners accrue statutory "good time" which, if not forfeited or withheld, results in an early release from the sentence being served. See 18 U.S.C. 4161 *et seq.* In addition, prisoners in the federal system (see 18 U.S.C. 4126, 4162), and many state prisoners, may earn varying types of meritorious or extra good time under discretionary prison rules. Forfeiture of good time also affects eligibility for parole (see 28 C.F.R. 2.2, 2.13), at least when the forfeited good time has not been restored.

As this Court noted in *Wolff*, *supra*, 418 U.S. at 571, n. 19, it would be difficult to distinguish between procedures that are required when good time is forfeited and those that must be extended when disciplinary segregation is imposed. Accordingly, the Bureau of Prisons provides identical procedures prior to imposition of either of these sanctions. As a matter of policy, the federal system has extended the *Wolff* requirements to instances in which the inmate may be transferred for disciplinary reasons or in which the Institution Discipline Committee recommends to the Board of Parole that a prisoner's parole grant be retarded or rescinded. See Appendix B, *infra*, pp. 73–79.

officials to inform the prisoner that he may remain silent if the infraction may be the subject of a later criminal prosecution, and to provide the inmate with counsel if the violation of prison rules may also be punishable as a crime. These additional requirements will not necessarily improve the reliability or fairness of the determination of the factual predicate for imposition of sanctions. In any event, they are unjustified in light of the unique setting in which such disciplinary actions occurs and the multiple purposes of prison discipline within that setting. *Morrissey* held, and *Wolff* reaffirmed, that such factors must be taken into account in determining the procedures required as a matter of due process; thus, the Court stated in *Wolff* that the question of "what procedures due process may require" in a given set of circumstances is to be determined in light of (1) "the private interest that has been affected" and (2) "the precise nature of the government function involved." 418 U.S. at 560.

In mandating the additional procedural requirements that must be followed in any prison disciplinary proceedings which may result in serious sanctions or which could conceivably lead to a criminal prosecution, the courts below did not undertake the functional analysis required by *Wolff* and failed to evaluate properly the purposes, setting, and consequences of prison disciplinary proceedings vis-a-vis the interests of the inmate in enjoying more formal institutional procedures.

B. THE MULTIPLE PURPOSES AND UNIQUE INSTITUTIONAL SETTING OF PRISON DISCIPLINE REQUIRE FLEXIBLE PROCEDURES

Wolff observed that "[p]rison disciplinary proceedings * * * take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so" (418 U.S. at 561). Such persons often "have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life" (*id.* at 562). Within prison walls, the keepers and the kept always remain in close proximity to each other; "[t]ension between them is unremitting," and "[f]rustration, resentment, and despair are commonplace" (*ibid.*). It was in consideration of this context that *Wolff* gave content to the generalities of the Due Process Clause. The Court held that many procedures that must be made available "to free citizens in an open society, or for parolees or probationers under only limited restraints" (418 U.S. at 560) clearly are inappropriate to prisons. Compare this with *Morrissey* v. *Brewer, supra,* 408 U.S. at 483. In so holding, the Court recognized the need for flexibility in handling infractions of prison rules and wisely provided that "the continuing development" of institutional procedures should be left "to the sound discretion of corrections officials" (418 U.S. at 568).

The disciplinary rules of the Bureau of Prisons form part of this ongoing evolutionary process. (Pertinent aspects of the present rules are described in

Appendix A to this Brief.)[6] In developing these rules, the Bureau of Prisons has attempted to take into account the purposes that prison discipline is intended to serve and the unique institutional setting in which it occurs. The result has been a cautious but steady development and refinement of the procedural rights extended to inmates.

The following discussion of factors bearing on the decisions made by federal prison authorities in establishing those rights is not intended to suggest that the Bureau of Prisons has a monopoly of wisdom in these matters, nor that arguments cannot be made in support of a different array of procedures. It is intended, rather, to show that the current rules represent a reasoned and reasonable accommodation of conflicting interests, developed by the authorities who bear the heavy burden of maintaining order in a closed society of atypically disorderly people and of attempting to control and change their antisocial tendencies. We submit that the judgment of the expert administrators on these questions is entitled to considerable weight.

1. *The institutional environment of prisoners is unique*

Prisoners differ from the free society of the world outside in many significant respects. They are, as *Wolff* observed, populated by a group of individuals who have been deprived of their liberty by the state because they have violated one or more of the laws established by society for its orderly governance.

[6] The history of the federal prison system and the development of its disciplinary rules are set forth in the Appendix to our *amicus* brief in *Wolff*.

Wolff, supra, 418 U.S. at 561. "Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends" (*id.* at 561–562).[7] Prison inmates have been consigned to that station in life because they share the common characteristic of having one or more times resorted to seriously illegal methods to achieve their goals or to resolve problems confronting them. In many cases, moreover, the prior offenses for which they are imprisoned will give officials good reason to believe that inmates would "disrupt and exploit the disciplinary process for their own ends" (*id.* at 563).

Many inmates enter prison with feelings of hostility and defeat, perceiving themselves to be the victims of a "bad break" or unfairly convicted, whether or not any objective observer would agree. As one team of commentators has noted (Taft and England, *Criminology* 468–469 (4th ed. 1967)):

> Unconscious of his own more subtle motivations, the inmate exaggerates the "excuse" he finds in the immediate conditions which in-

[7] For example, according to the as-yet unpublished annual report of the Bureau of Prisons for fiscal 1974, more than 52 percent of the inmates in federal prisons at the end of that year had at least one known prior commitment to a state or federal prison (based on a prior conviction) and 27 percent had at least three or more such prior commitments. Nearly 34 percent, moreover, were confined because of violation of the terms of parole or mandatory release. A further unknown proportion of inmates had prior convictions for which they had not been committed. The apparently high rate or recidivism is, of course, not necessarily indicative of the results following release from a *federal* prison.

> fluenced his act. The crankiness of his wife, the stimulus of too much whisky, the "just" rage produced by ill-luck in gambling, his envy at the easy money obtained with impunity not only by other criminals but by exploiters not classified by society as criminals—such "causal factors," superficial or inadequate as they are, must be very clear in the consciousness of the criminal entering prison.

See also Sykes, *Crime and Society* 89–93 (1966). Such a refusal to accept guilt for wrongdoing and a concomitant tendency to project blame on others are often seen in prisoners' attitudes towards events occurring in prison and their responsibility toward them. See, *e.g.*, Halleck, *Psychiatry and the Dilemmas of Crime* 306 (1st ed. 1967); Abrahamsen, *The Psychology of Crime* 110 (1st ed. 1960).[8]

Moreover, the constant exposure of prisoners to the supervision and control of prison staff in this setting may tend, not infrequently, to breed an intense hostility between the two—to a greater extent and with sharper focus than in almost any setting in the outside world. See Sykes, *The Society of Captives* 41–43, 73–74 (1958). The characteristics of prison life and inmate-staff relationships in many prisons (though not necessarily in all federal prisons) thus includes an ever-present potential for explosive confrontations in which prisoners give vent to hostilities and frustrations or members of the staff overreact due to their

[8] Refusal to accept guilt for wrongdoing may be especially prevalent in a penitentiary, where there are older, more criminally sophisticated offenders. Thus, disputation of the charges and emotional confrontations are likely to be especially frequent in prison hearings. See, *e.g.*, Halleck, *supra*, at 110.

sense of belonging to a beleaguered, alienated, and often disliked minority having only tenuous control over the situation. See Gibbons, *Society, Crime, and Criminal Careers* 468–472 (2d ed. 1973); Sykes, *Crime and Society, supra,* at 99–106.

To a substantial extent, this country's adversarial trial system presupposes that hostilities naturally arising from confrontations can be diffused—sometimes by the actions of the hearing official or other authorities, but more often by the fact that the individual affected (and others who have confronted him) can return to their respective homes, avoiding further contact and venting their emotions in less explosive surroundings. Cf. *Wolff, supra,* 418 U.S. at 568.

This is not the case in prisons. Diffusion of antagonisms occurs less readily; the parties always remain in close proximity to each other, and many inmates are characteristically impulsive and action oriented. See Halleck, *supra,* at 284; Eysenck, *Crime and Personality* 144 (1964). Antagonisms sparked or exascerbated by disciplinary proceedings may easily be fanned into flames of violence or mutiny in the close confines of the prison.

Moreover, in situations involving staff members appearing as witnesses, the supervisory relationships essential to achievement of correctional goals may be disrupted or destroyed by the confrontation experience. By placing the inmate in a position of equal contest with correctional officers, confrontation can erode the officers' control and authority. See McCorkle, *Guard-Inmate Relationships in Prison,* in *The*

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Sociology of Punishment and Correction 108–110 (Johnson, Savitz and Wolfgang ed. 1962). The effect of confrontation is potentially even more serious in the case of the inmate-witness who has observed or been the victim of misconduct by another prisoner. The animosity that seems likely to result from a confrontation between inmates in a disciplinary hearing would continue in the close confines of the prison and might result in violent retribution or the need to make extraordinary provisions for protection of the inmate-witness. See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 46 (1967). One of the first principles of the unwritten "inmates code" is that "inmates stick together" and that those who breach the code risk violent reprisal. See Gibbons, *supra,* at 475–479; Ward & Wilner, *The Inmate Code and Attitude Change,* in *Prison Treatment and Parole Survival: An Empirical Assessment,* ch. VI (1971); Sykes & Messinger, *The Inmate Social Code and its Functions,* in *The Sociology of Punishment & Correction,* ch. 14.[9]

[9] Professor Sykes, in discussing the inmate code, writes (*The Society of Captives, supra,* at 87):

"The most obvious social boundry in the custodial institution is, of course, that which exists between captors and captives; and inmates argue fiercely that a prisoner should never give any information to the custodians which will act to the detriment of a fellow captive. Since the most trivial piece of information may, all unwittingly, lead to another inmate's downfall, the ban on communication is extended to cover all but the most routine matters. The bureaucracy of custodians and the population of prisoners are supposed to struggle in silence."

One conclusion that may be drawn from consideration of the prison environment, accordingly, is that direct confrontations between inmates and staff, as well as among inmates, are to be avoided wherever possible. Otherwise, "prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point * * *." *Braxton* v. *Carlson,* 483 F. 2d 933, 941 (C.A. 3). Many inmates fearing retaliation, might refuse to come forward to report or confirm incidents; others might take the risk and lose. And in either event prisons would become less safe for the majority of inmates who adhere to the institution's rules.[10]

2. There is an integral relationship between the rehabilitative purpose of imprisonment and the role of discipline

The role of discipline in prisons today reflects a series of evolutionary changes over the past 200 years. Change has occurred as the result of gradual shifts in public policies and attitudes toward the role of prisons themselves—an evolution that this Court indicated should continue without the imposition of inflexible constitutional constraints. *Wolff, supra,* 418 U.S. at 571–572. The history of this evolution reveals that as the purposes to be served by imprisonment have changed, so have the nature and role of discipline

[10] We acknowledge, of course, that lack of confrontation could increase the chance of false accusations and unwarranted discipline. Prison officials can compensate in part by viewing with skepticism the reports of inmates, but even so the problem remains. Nevertheless, prison officials believe that the costs of error are more than outweighed by the difficulties confrontation would create.

within the prisons. See, *e.g.*, Taft & England, *Criminology,* ch. 23 (4th ed. 1967); Tappan, *Crime, Justice and Correction,* ch. 20 (1960).

Forty-five years ago, when the Federal Bureau of Prisons was created, the federal government maintained one institution for delinquent youth, one institution for women, three penitentiaries, and a detention facility—all operating autonomously. See Tappan, *supra,* at 619–620; Huston, *The Department of Justice* 204–206 (1967). Federal prisons of the time were candidates for praise by the 19th century warden who stated that prisons "should be terrifying, dark, and comfortless abodes of guilt and wretchedness." These penitentiaries were isolated, forboding places, with punishment their sole objective. Communication and freedom of movement were viewed as privileges—and the existence of too many privileges was thought to undermine discipline and the security of the institution. Discipline was authoritarian. Penalties ranged in harshness from several days' isolation on bread and water to forfeiture of all good time credit. An inmate who protested such penalties risked being shackled to his cell bars. Bureau of Prisons, *Thirty Years of Prison Progress* 4–5 (1961).

The Bureau of Prisons, like many state penal systems, soon decided that its chief mission was to protect the public, and that protection could best be achieved by offering rehabilitation opportunities to inmates. Carlson, *The Federal Prison System: Forty-five Years of Change,* Federal Probation 38 (June 1975). Conditions within prisons began to change for the better,

sweeping changes have been effectuated, and further experimentation and change is contemplated.

The federal prison system now maintains 50 correctional institutions, including reformatories, open camps, youth institutions, a medical center and 16 half-way houses. Rehabilitation is still the major goal of federal institutions (*id.* at 38–39). Institutional discipline no longer serves only the narrow purposes of maintaining order within the prison. It also serves the larger goals of the institution as a whole and has a role in helping the inmate to achieve self-reliance, self-control, self-respect, and self-discipline. See Eysenck, *supra,* at 144–161.

It is now widely agreed by correctional authorities (American Correction Association, *Manual of Correctional Standards,* ch. 24.7), that——

> [d]iscipline * * * looks beyond the limits of the inmate's term of confinement. It must seek to insure carry-over value by inculcating standards which the inmate will maintain after release. It must always be objective and must develop in the inmate personal responsibility to that social community to which he will return.

In its broadest sense, modern prison discipline is not an aberration from the constructive program of the institution but an integral part of it. See Taft & England, *supra,* at 427; Richmond, *Prisoner Management and Control* 14 (1969).[11]

[11] It has been said that "[t]he administrative manipulation of rewards, favors, privileges and punishments with a view to promoting changes in value identification" is "a central admin-

Many prison authorities believe that the disciplinary process loses much if not most of its value if it acquires excessive formalism. Procedural and adversarial trappings may alienate the inmate from the staff and from his fellow inmates and prevent the disciplinary process from fostering in him a clear regret for having committed the offense. In establishing and modifying a disciplinary system, prison officials believe they must tread a difficult middle ground between procedures and programs that may be so strict as to be unfair and thereby counter-productive and those that do not embody sufficient control to achieve their ends. See Taft & England, *supra,* at 428. In articulating the need to maintain this delicate balance, one experienced prison official has observed.

> The evil effects of harsh discipline are readily recognized. Brutal punishments have been tried and found wanting. Lax discipline can be equally injurious to the morale of the prisoners and even more injurious to the maintenance of security and good order. The prisoner frequently has the same Beccarian concepts of punishment as the layman in a free society [referring to the utilitarian philosophy of Beccaria, the eighteenth century Italian criminologist]. The prisoner who wants to do his time and get it over with has little liking for a prison where he can find no sense of direction in a maze of favoritism, prison politics, variable rules, indefinite procedures in

istrative objective" in obtaining a shift in the inmate's value orientation. Ohlin, *Modification of the Criminal Value System,* in *The Sociology of Punishment and Correction* 179 (Johnson ed. 1962).

> discipline, and the hypocrisies that underlie weak administration. [McKendrick, *Custody and Discipline,* in *Contemporary Correction* 169 (Tappan ed. 1951).][12]

The prison discipline process has also been said to involve other important practical considerations—including the need for correctional officials to sustain their authority and the need in many cases for quick and simple decisional procedures[13]—which this Court has found to militate against the application of the full panoply of due process protections that are required in some non-prison contexts. *Wolff, supra,* 418 U.S. at 563. See also, President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 12–13 (1967).

To reconcile these interests, many correctional systems, including the Bureau of Prisons, have adopted

[12] While some commentators attribute prison riots and disorders to "repressive" disciplinary practices and other abuses, research indicates that in many instances these problems stem instead from administrative weakness. As Professor Tappan has noted:

"It is only too clear that appeasement of rioting inmates in some penal institutions has stimulated riots in others. The discovery that threats, violence, and destruction may gain concessions has had anomalous consequences. Riots have produced some changes in prison programs and, incidentally, have provided a fictitious color of accuracy to the contention that abusive conditions incited the riots." (Tappan, *Crime, Justice and Correction* 701–702, n. 68 (1960)).

[13] Many behavioral scientists have emphasized that discipline generally should closely follow the violation if it is to be effective in behavior modification. See generally Bandora, *Principles of Behavior Modification* (1967); Krasner & Ullman, *Research in Behavior Modification* (1965); Skinner, *Science and Human Behavior* (1953).

flexible hearing procedures more informal in significant respects than those of a criminal trial. These procedures represent an effort to balance important and to some extent conflicting goals: on the one hand, the need for expeditious and non-inflammatory resolution of misconduct reports; on the other, the goal of reducing the risk of unfair, arbitrary, or factually unfounded disciplinary action."[14]

In view of the emphasis placed in prison discipline on rehabilitation and adjustment of the inmate's attitudes, the attendant value of promptness in the imposition of disciplinary action and flexibility in its selection, and the likelihood that direct, adversarial confrontations will seriously interfere with the rehabilitative process, there are substantial considerations that weigh against increasing the number of procedural requirements beyond those found sufficient by this Court in *Wolff*.

C. THE ADDITIONAL PROCEDURES HELD TO BE REQUIRED BY THE COURTS OF APPEALS WOULD IMPAIR PRISON SECURITY AND CHANGE THE NATURE OF THE DISCIPLINARY PROCESS

The effect of procedures required by the courts below—confrontation of witnesses, decisions based solely

[14] Flexibility in approach and procedures is a key element in the correctional context. As one observer has noted:
"Objectionable behavior by men in prison is so diverse that no set of rules could encompass it without being long, complex, and difficult to apply, or so arbitrary that it would arouse resentment by dealing similarly with highly diverse acts. It follows that strain in inmate-staff relationships is minimized by a policy of flexible rules interpreted to fit each case which takes into account primarily the effect of each penalty on the future behavior of the offender." (Glaser, *The Effectiveness of a Prison and Parole System* 120–121 (1969).)

on evidence introduced at the disciplinary hearing, and injection of *Miranda*-like warnings and a right to counsel—will be to convert prison disciplinary proceedings into mini-trials. If this Court upholds those requirements, it will become difficult if not impossible to preserve the rehabilitative focus of such proceedings; furthermore, the requirements might seriously impede the important function of maintaining order and protecting the safety and welfare of both inmates and staff.

1. *Confrontation and cross-examination*

Wolff observed that confrontation and cross-examination of witnesses could create a grave threat of institutional disruption (418 U.S. 567–568) and concluded that "[t]he better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons" (*id.* at 569).

The approach of *Wolff* serves not only to protect witnesses from reprisals, but also to minimize the frequency of confrontations between inmate and staff or among inmates. Based on their experience, prison officials believe that such confrontations not only interfere with the rehabilitative process but also are likely to result in increased tension and hostility between those involved, which might lead to further misconduct, possibly of a more serious nature. Moreover, confrontations could have undesirable secondary consequences; for example, a presumptive right to confront and cross-examine almost certainly would dis-

courage inmates from reporting disciplinary infractions to prison authorities lest they be revealed as violators of the "inmate code" (see p. 28, *supra*). Such deterrence to reporting would prevent the needed imposition of discipline in many situations and could measurably contribute to a decline in the security of inmates.

Clutchette respected the form, but not the substance, of these considerations and of this Court's holding in *Wolff*. While it recognized that *Wolff* had left the provision of confrontation and cross-examination to the discretion of prison officials, it sharply limited (if it did not abolish) the right of those officials to exercise that discretion. The court of appeals held that there is a presumption in favor of confrontation and cross-examination, a presumption that can be rebutted only if prison officials make a written explanation "setting forth reasons," which in turn are limited to "reprisals, unmanageability, disruption, [and] safety of prison personnel" (Pet No. 74–1194 App. v). The court of appeals did not explain why it is incumbent upon prison officials to rebut in detail a presumption in favor of confrontation and cross-examination if, as *Wolff* held, confrontation and cross-examination in a prison setting is ordinarily undesirable.

Clutchette has placed confrontation into the position *Wolff* reserved for the inmate's presumptive right to call his own witnesses and present documentary evidence (418 U.S. at 566–567). *Wolff* went on to hold, however, that confrontation should be governed by different rules. We submit that, in light of the substantial interests that would be jeopardized by making confrontations with prison officials and fellow inmates a routine matter, there should be a presumption against, not in favor of, confrontation; if that is the presumption, it ordinarily should not be necessary for prison officials to explain their reasons for withholding those procedures.

If it is ever incumbent upon prison officials to explain their actions in denying confrontation and cross-examination, we submit that this simply cannot be accomplished (nor does the Constitution require that it be accomplished) in the manner prescribed by *Clutchette*. The court of appeals required prison officials to articulate one of four enumerated reasons in each particular case. The court's list of permissible reasons is far too short, for many other concerns, such as prevention of increased hostility among inmates or between inmates and guards, and the preservation of proper rehabilitative conditions, are implicated in decisions of this sort.

Perhaps even more significant, however, is the fact that many of the possible outcomes of confrontation that the court of appeals accepts as good reasons for limiting the practice are, in the real world, no more than projections of probabilistic events. They cannot be forecast in advance as to any particular case. For example, while prison officials may know that one of every ten inmate-inmate confrontations will lead to violence, they cannot know in advance which of the ten confrontations that will be. If the officials are relegated to bypassing confrontation and cross-exami-

nation only when they have proof that a particular confrontation poses extraordinary risks, then they will be obliged to allow confrontation and cross-examination as a matter of course, incurring all of the costs that entails. On the other hand, if the officials can decline to allow confrontation simply by reciting the general probability of risks, then there is no point in requiring the recitation, for it will apply equally to most cases. In other words, the reasons for declining to permit confrontation and cross-examination apply to the disciplinary process as a whole and not, as the court of appeals supposed, apply atomistically to individual hearings.

Finally, the court of appeals seems to have invited continued judicial scrutiny of the entire disciplinary process, not only of the general outlines of procedures used in disciplinary hearings but also of each hearing itself and even of each decision in each proceeding. Thus, it has stated that failure to supply "satisfactory" reasons for denying confrontation "can be called to the attention * * * of the courts" (Pet. No. 74–1194 App. v). We find it hard to imagine a development that could be more detrimental to the salutary purposes served by prison discipline than to hold out the possibility that the disciplinary hearing is simply the opening phase of a protracted legal war that does not become final until each decision has been considered by two federal courts and certiorari has been denied. The court of appeals has turned *Wolff* on its head.

2. Use of evidence not introduced at the disciplinary hearing

Many of the considerations we have outlined above apply as well to the holding of *Clutchette* (497 F. 2d at 820) that "the disciplinary committee must be required to make its fact finding determinations based solely upon the evidence presented at the hearing." The court of appeals advanced but a single reason for imposing this requirement—that it is necessary "[f]or the right to confront and cross-examine adverse witnesses to be meaningful" (*ibid.*). The court's conclusion should fall with its premise, for we have argued that *Wolff* correctly held that there is no general right to confrontation and cross-examination.

Moreover, we submit that there are strong reasons for permitting prison administrators to rely, on occasion, upon evidence outside the record of the hearing. In some cases it may be necessary to withhold particular items of evidence in order to protect other inmates from reprisals; in other cases, presentation of all of the evidence available to prison officials could unduly prolong a hearing and make it resemble, all too closely, a "trial"; finally, in some cases supplemental or confirmatory evidence may come to the attention of prison officials only after the disciplinary hearing has been completed. The major purpose of holding hearings and allowing the inmate to be present is to inform the inmate of what is happening to him, and why, and to allow him (if he chooses) to present

his side of the story. See generally Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267 (1975). None of these interests is furthered by prohibiting use of extra-record evidence, unless the withholding of evidence is so extensive that it undermines the inmate's ability to understand the nature of the infraction he is alleged to have committed and impairs his ability to respond to the allegations. Once evidence sufficient to meet those needs has been presented, the Due Process Clause does not require more.

3. The right to counsel

Wolff rather clearly held that the Due Process Clause does not require counsel at disciplinary proceedings. The Court recognized that counsel, even more than confrontation and cross-examination, would inevitably alter the nature of the proceedings and reduce, if not eliminate, the usefulness of discipline as an instrument of rehabilitation.

Gagnon v. *Scarpelli, supra,* 411 U.S. at 790, held that "the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most [parole and probation] revocation hearings * * *." The Court observed (*id.* at 787–788):

> If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body

> itself, aptly described in *Morrissey* as being "predictive and discretionary" as well as fact-finding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.

Wolff held that such considerations are "even more pertinent" (418 U.S. at 569) in prison disciplinary proceedings, in which the prisoner has a significantly lesser interest at stake than does a parolee or probationer facing revocation.

Apart from the inevitable transformation in the nature of the proceedings and their loss of utility as means to further correctional goals (*id.* at 570), a requirement of counsel will also introduce a significant element of delay. Prisons are frequently in isolated locations far from ready access to counsel. Counsel would have to be engaged, travel to the prison to consult with the inmate, prepare for the hearing, and so on. A requirement of counsel, whether retained or provided by the government, therefore would lead to delays over and above the delays that probably would result from actions taken by counsel during the hearings and from the generally increased formality of the proceedings.

The Bureau of Prisons believes that delay in the imposition of discipline is undesirable: it detracts from the efficacy of the action ultimately taken.

The balance has been struck against participation by counsel largely because of this Court's assessment that the potential gain in accuracy of fact-finding is outweighed by other important and legitimate considerations. These concerns prompted this Court to hold that inmates have no right to either retained or appointed counsel in disciplinary proceedings. *Wolff, supra,* 418 U.S. at 570.

In spite of *Wolff's* holding, and in spite of the weighty arguments that counsel would be positively detrimental to the disciplinary process, both courts of appeals have required counsel, "not because *Wolff* requires it * * * but because *Miranda* requires it in light of future criminal prosecution" (Pet. No. 74–1187 App. 14). We submit that the courts' reliance upon *Miranda* v. *Arizona,* 384 U.S. 436, and *Mathis* v. *United States,* 391 U.S. 1, as sources of a constitutional right to counsel in disciplinary proceedings misapprehends both the nature of disciplinary proceedings and the holdings of those cases.[15]

[15] *Palmigiano* suggests that "in cases where criminal charges are a realistic possibility, prison authorities *should consider* whether defense counsel, if requested, should not be let into the disciplinary hearing" (Pet. No. 74–1187 App. 14; emphasis added). In our view, this does not constitutionally require that the State allow counsel into the disciplinary hearing but simply indicates that prison officials, in the exercise of their discretion, may choose to permit the inmate to be represented by counsel. However, as even this limited holding is premised on *Miranda*, we join the State in opposition to it.

Cluchette held that the right to counsel attaches "when a prisoner 'is required to appear before a prison disciplinary committee for violation of a prison rule which *may* also be punishable by state authorities'" (510 F. 2d at 616; emphasis added). Theoretically, a substantial majority of disciplinary proceedings *may* also be punishable by criminal prosecution. As a realistic matter, however, criminal charges are brought only in those relatively few cases in which the inmate's conduct involves a serious offense. Such infractions as possession of a weapon or destruction of prison property are criminal offenses (18 U.S.C. 1361, 1792), but rarely are they the subject of criminal prosecution.

When criminal prosecution is contemplated, the Bureau of Prisons holds disciplinary proceedings briefly in abeyance until the Federal Bureau of Investigation has questioned the inmate; further delay can be requested by prosecutorial officials. Statements of the inmate during the hearings are almost never used in any criminal prosecution against him. However, if the *Cluchette* holding is permitted to stand, prison officials would be required to provide the opportunity for counsel in each of the instances, since virtually every infraction *may* be the subject of criminal prosecution.

"Custodial interrogation" is the *sine qua non* for the applicability of *Miranda. Miranda* exhaustively analyzed all of the aspects of such interrogation that might lead individuals to surrender their privilege against self-incrimination; it discussed the effects of isolation, incommunicado interrogation, exhaustion, implicit threats, and so on. These circumstances are simply not present in prison disciplinary hearings. A federal disciplinary hearing is not "interrogation." An inmate is advised of the charges against him and asked whether he desires to respond. He may or may not choose to offer an explanation or make a statement, but he is

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not compelled to respond or instructed to speak. No adverse inferences are drawn if he remains silent."[16] Indeed, current federal regulations provide that the inmate's entire presentation may be conducted by the counsel-substitute to which he is entitled; the counsel-substitute can present the inmate's statement for him and introduce the inmate's evidence in defense, mitigation, or extenuation. We submit that this procedure does not involve the sort of "interrogation" to which *Miranda* was addressed.

Even if the disciplinary hearing is "interrogation" in some sense, it is not "custodial" interrogation. We do not contend that a prison inmate is not in "custody" within the meaning of *Miranda* and *Mathis*. We do submit, however, that the custody imposed by everyday prison life does not extend to presence at the disciplinary hearing; the inmate has a right but not an obligation to attend the hearing. If the inmate decides to attend the hearing, he is free to depart. What is more, the "custody" of the hearing, if there is any, is quite different from the closed and incommunicado interrogations presented in *Miranda* and *Mathis*. As *Miranda* observed, the danger of compulsion during custodial interrogation arises principally from the fact that the interrogation takes place in private (384 U.S. at 449). Privacy is "essential to prevent distraction and to deprive [a suspect] of any

[16] *Palmigiano* involved a case in which the inmate was told that his silence would be used against him. We discuss this at pages 48–51, *infra*. The court of appeals did not limit its right to counsel to such cases, however, nor did *Cluchette*, in which no adverse inference was drawn from silence.

outside support" (*id.* at 455). Once in private, the police can "persuade, trick, or cajole [the suspect] out of exercising his constitutional rights" (*ibid.*). Privacy also permits the police to resort to "third degree" tactics, subjecting the suspect to mental or physical exhaustion by repeated questioning. It is therefore not surprising that *Miranda* recognized (*id.* at 461) that "the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery."

The prison disciplinary hearing, far from being a private and incommunicado interrogation, is an open hearing presided over by an impartial panel and attended by witnesses and counsel-substitute of the inmate's choice. A record often is kept of the proceedings. Accordingly, even if he desired to do so, there is little likelihood that an individual panel member could resort to the coercive tactics open to police during stationhouse interrogation. If such tactics are employed, they will be detected; there is no "gap in [judicial] knowledge as to what in fact goes on in the interrogation rooms" (*Miranda, supra,* 384 U.S. at 448). We submit that the prison disciplinary hearings is not subject to the abuse and coercion interest in stationhouse interrogation; accordingly, there is no constitutional right to counsel to guard against such abuses.

Should the Court disagree with our analysis to this point, however, it still does not follow that counsel is

required in prison disciplinary hearings. The *Miranda* warnings are prophylactic tools designed to guard against the possibility that a suspect may be tricked or coerced into surrendering his Fifth Amendment privilege against self-incrimination or his Sixth Amendment right to counsel at "critical stages" of the proceedings against him. See *Michigan* v. *Tucker,* 417 U.S. 433, 446. *Miranda* itself establishes a rule of evidence: statements given during custodial interrogation without the assistance of counsel, and without advice that a suspect is entitled to counsel, are not admissible in evidence in a criminal prosecution. The rule has nothing whatever to do with the procedures officials ought to use in conducting disciplinary hearings. As Judge Lumbard wrote, concurring in *Inmates of Attica Correctional Facility* v. *Rockefeller,* 453 F. 2d 12, 25 (C.A. 2):

> Neither *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), nor any other decision of the Supreme Court, or of this court, holds that the state must conduct its investigation in any particular way or that certain warnings must be given to any or all persons who may be interrogated by those investigating crimes which were or may have been committed at Attica. All that *Miranda* holds is that a defendant's statement may not be used against him in a criminal prosecution or otherwise unless he has first been given certain warnings and he has knowingly elected to speak with or without advice of counsel. A conviction will not stand if it has been obtained through the use at trial of a statement made by a defendant

> who has not been warned substantially as *Miranda* specifies. *Miranda* is a rule of evidence.

See also *Chavez-Raya* v. *Immigration and Naturalization Service,* C.A. 7, No. 74–1482, decided July 16, 1975, in which the court held that *Miranda* warnings are not required in immigration proceedings, even though the custodial interrogation may lead to criminal prosecution as well as to deportation. The court held that the individual's statements could be used against him and could lead to his deportation; the only remedy would be exclusion when, if ever, they were offered against him in a criminal case.

Miranda's prophylactic devices guard against deprivation of underlying rights—underlying rights that are intrinsic to the criminal process but not to prison discipline. As *Wolff* held, there is no underlying right to counsel, so that it is not possible to contend that counsel is required at the hearing in order to guard against loss of that right through coercion or trickery. Cf. *Kirby* v. *Illinois,* 406 U.S. 682. Moreover, because "[p]rison disciplinary proceedings are not part of a criminal prosecution" (*Wolff, supra,* 418 U.S. at 556), the Fifth Amendment privilege against self-incrimination does not apply directly, but only insofar as statements made by the inmate might be relevant to some future criminal case against him.

Both courts of appeals appear to have recognized these arguments, for they held that counsel is necessary only when an inmate might be liable to subsequent criminal prosecution for his infractions of prison rules. But if the courts simply are seeking to

protect rights in potential future prosecutions, it should follow that the prison discipline can be imposed whether or not the inmate could conceivably be criminally prosecuted. To the extent the right to counsel is extended as a prophylaxis to underlying constitutional rights, it does not apply to disciplinary hearings because there are no relevant underlying rights to safeguard. To the extent the right to counsel is extended as a prophylaxis to rights at future criminal cases, the courts of appeals have selected the improper remedy. They should hold not that the imposition of prison discipline in the absence of counsel is improper, but that any statements made by the inmate in the absense of *Miranda* warnings are inadmissible in evidence at a subsequent trial.

In short, the courts below have engrafted on the disciplinary proceeding a requirement of counsel—"not [itself] ~~practiced~~ protected by the Constitution" *Tucker, supra,* 417 U.S. at 444)—which is likely to delay proceedings and diminish or destroy the usefulness of discipline as part of a program of behavioral modification. The *Miranda* Court did not intend to create "a constitutional straitjacket" (384 U.S. at 467) to be applied across the board to every conceivable form of official hearing. Counsel has no place in a prison disciplinary proceeding.

4. *The "right to silence" and "use immunity"*

Both courts of appeals have held that there is a "right to silence" during the disciplinary proceedings. *Palmigiano* also stated that if an inmate is advised

that his silence will be held against him, any subsequent statements he may make are "coerced" and cannot be used in a subsequent criminal proceeding. Cf. *Lefkowitz* v. *Turley,* 414 U.S. 70.

We do not address these questions in detail, for an inmate attending a federal disciplinary proceeding need not speak, and, if he does not speak, no adverse inferences are drawn. However, we do not concede that these procedures are required as a matter of constitutional law. For the reasons we have advanced in the previous section, no right to silence was created by *Miranda.* Such a right would have to have its roots directly in that portion of the Fifth Amendment that states that no man shall be compelled in any criminal case to be a witness against himself. *Wolff* held (418 U.S. at 556) that disciplinary hearings are not part of a criminal prosecution." The inmate cannot, therefore, claim an absolute right to be silent. His right is coextensive with that of any party in a civil proceeding: he has a right not to give evidence that will incriminate him or form a link in a chain of incriminating evidence, unless that right is extinguished by a grant of "use immunity."

" Otherwise it would not be possible to justify this Court's holdings that there is no right to counsel or to confront and cross-examine one's accusers. It is true that discipline may involve loss of good time, and therefore additional incarceration; this surely is a sufficiently strong interest to invoke many of the protections that the criminal process employs to safeguard an individual against the risk of error or arbitrary treatment. But it does not make the proceedings "criminal," and the privilege against self-incrimination applies directly only to "criminal" cases.

We see no constitutional bar to questioning an inmate about his actions; if he invokes his privilege in response, it should be permissible to draw whatever inference may be proper in civil proceedings. Although this Court has held that no inference can be drawn from failure to testify in criminal trials (*Griffin* v. *California,* 380 U.S. 609), it has not extended that rule to civil cases. In a deportation proceeding, for example, even though the stakes are high, the individual can be questioned and informed that, if he declines to testify, adverse inferences will be drawn. *United States ex rel. Bilokumsky* v. *Tod,* 263 U.S. 149, 153–154 (Brandeis, J.). The inference from silence cannot by itself justify deportation (*Gastelum-Quinones* v. *Kennedy,* 374 U.S. 469), but it can be given whatever probative weight it reasonably carries in the circumstances.

Finally, because disciplinary proceedings are civil in nature, the inmate has no "presumption of innocence." After prison officials have satisfied themselves that the weight of the evidence against the inmate justifies a belief that he has committed the infraction charged, the Constitution would not prevent them from taking disciplinary action (on the basis of this "*prima facie* case") unless the inmate convinces them that the facts are otherwise. Although this would exert substantial pressure on the inmate to come forward with evidence (including his own testimony), it would not be unconstitutional. Cf. *McGautha* v. *California,* 402 U.S. 183; *Flint* v. *Mullen,* 499 F. 2d 100 (C.A. 1), certiorari denied, 419 U.S. 1026. The procedure would

be objectionable only if the officials imposed some additional disability upon the inmate, in effect increasing the stakes of the hearing. See *Lefkowitz, supra* (loss of government contracts). But even so, *Gardner* v. *Broderick,* 392 U.S. 273, held that a policeman could be discharged for refusing to answer questions about his employment; he could not be compelled to surrender his privilege against self-incrimination in any criminal case, but some appropriate civil consequences could attach when a person declines to speak. We submit that an inmate can be offered the choice between speaking and remaining silent in a disciplinary hearing, and that the Constitution permits prison authorities to inform him that, if he chooses the latter course, such inferences as are reasonably appropriate under the circumstances will be drawn.

5. Prison officials should be allowed to engage in continuing development of their procedures

In the last analysis, the question of procedural requirements for the administration of prison discipline is, we respectfully submit, one that courts should approach with a full awareness of its complexity and with a sober appreciation of the limitations (given the present state of knowledge on the subject) that exist on the ability of the judiciary to supply detailed and immutable solutions at this time. As the Second Circuit observed in *Sostre* v. *McGinnis,* 442 F. 2d 178, 197, footnote omitted:

> It would be too simplistic to dissociate the impact of punishment meted out after a disciplinary hearing from the method by which the

hearing itself is conducted. As one court has observed: "The association between men in correction institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings." *Edwards* v. *Sard,* 250 F. Supp. 977, 981 (D.D.C. 1966). It is sad but true that the study of the prison subculture by psychologists and sociologists has until recently been largely neglected. Those who have looked into the problem, however, do not gainsay the volatility of relationships among prisoners and prison officials. * * * We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against the administration of discipline by prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.

> We are particularly unwilling to interfere with state administrative processes when reliable, detailed information or empirical studies are as scanty as they are on the subject of prison disciplinary procedures.

The Bureau of Prisons, like other prison systems, has been engaged in a careful but steady development of procedures, adding those that experience shows will be beneficial to the prisoner yet consistent with the unique demands of the prison environment and the purposes of prison discipline, while discarding those

that prove less successful.[18] This developmental process, reflecting experience with prior changes, evolving public policy towards prisons, and expanding knowledge of the social dynamics of the prison community, ought not be rigidly circumscribed by inflexible procedural requirements imposed as a matter of unchanging constitutional law. *Wolff* well understood this delicate process, and the 14 months that have passed since it was handed down have not seen proof that its carefully balanced rules afford illusory or inadequate safeguards for the legitimate interests of prisoners. This is not the right time to replace the careful development of procedures with a fixed constellation of constitutional rules.

[18] We believe that there are likely to be special problems attendant upon overly rapid introduction of change into the prison environment. The maintenance of good order and the security of staff and inmates alike in a frequently hostile prison environment depend substantially on the existence of rules of conduct and established procedures for the prison, as well as on physical means such as walls and locks. Prison staff members often prefer that strict rules be maintained and enforced and may tend to feel threatened and weakened by changes in prison rules that appear to favor the prisoners. Prisoners, on the other hand, may feel that, once a rule has been changed in a way they perceive as favorable, the new rule is a matter of right, the revocation or alteration of which is likely to engender new hostilities. While neither of these opposing considerations should be the exclusive determinant of whether rules should be changed, they both caution against unduly frequent and possibly temporary or experimental changes in prison rules. It is the view of the Bureau of Prisons that significant changes in such rules should be preceded by careful consideration of the ramifications for all aspects of the unique prison environment, and that experimental changes, if necessary, should be made on a limited basis before being widely applied to all of the varied prison settings.

CONCLUSION

For the foregoing reasons, the judgments of the courts of appeals should be vacated and the cases remanded with directions to modify the judgments in accordance with this Court's opinion.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
JEROME M. FEIT,
GEORGE S. KOPP,
Attorneys.

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APPENDIX A

SUMMARY OF BUREAU OF PRISONS' DISCIPLINARY PROCEDURES

The objectives of inmate discipline, as stated in the Bureau of Prisons' most recent policy statement (7400.5D, issued July 7, 1975), are "to assure that inmate discipline and control are fully consonant with the correctional objectives of the institution, the focus being on (a) individual inmate adjustment to the program, behavior standards, and limitations necessarily imposed by the administration; (b) the general welfare and safety of the institutional community; and, (c) the incorporation of due process standards for inmate disciplinary hearings as prescribed by the Supreme Court in *Wolff* v. *McDonnell,* 418 .U.S. 528."[1] (The complete text of Policy Statement 7400.5D is reproduced as Appendix B).

[1]In regard to the last of these objectives, the Director of the Bureau of Prisons stated in issuing these policies:

"While the Supreme Court in *Wolff* v. *McDonnell* has not required the presence of attorneys nor confrontation and cross-examination at prison disciplinary hearings, it emphasized that the procedures now required for disciplinary hearings are 'not graven in stone.' Likewise, this policy statement may be subject to change upon further reflection of actual practice. Clearly then, the manner in which we implement this policy will determine whether the Court sees fit to impose stricter standards in the future. While we must be greatly concerned about the security of our institutions, we must also be genuinely concerned about the fairness of our discipline system. Your efforts toward these objectives are essential." (Bureau of Prisons, Operations Memorandum 7400.14, "Inmate Discipline" (October 4, 1974).)

complete text of Policy Statement 7400.5D is reproduced as Appendix B).

The purposes, in turn, give rise to a number of "general principles" by which the disciplinary system is to be governed,[2] in recognition of the fact that "[d]isciplinary action is but one factor in correctional treatment and control" and that as applied to an inmate who has misbehaved, the objective is his "future voluntary acceptance of institutional regulations which are required for the general welfare of the institution community and serve as an aid to law-abiding behavior following release" (app. B, *infra,* p. 61).

1. CURRENT DISCIPLINARY PROCEDURES FOR MINOR DISPOSITIONS

The chief executive officer of each institution delegates to a selected committee (sometimes referred to as Treatment Team or Unit Management Team) the authority to impose minor dispositions and sanctions for violations of institutional rules and regulations.

An inmate charged with misconduct is advised in

[2] These principles are as follows (App. B, *infra*, at pp. 63–64):

(a) Disciplinary action shall be taken at such times and in such measures and degree as is necessary to regulate an inmate's behavior within acceptable limits;

(b) Inmate behavior shall be controlled in a completely impartial and consistent manner;

(c) Disciplinary action shall not be capricious, retaliatory, or for the purpose of revenge;

(d) Corporal punishment of any kind is strictly prohibited; and

(e) Accurate, detailed reports of disciplinary actions shall be maintained in accordance with the requirements of this policy statement.

writing of the charge[3] within twenty-four hours of the infraction and is given an opportunity to state his version of the incident. The inmate is entitled to a hearing before the committee (of which neither the reporting nor investigating officer shall be a member) within forty-eight hours of the incident. He is again advised of the charges and afforded the opportunity to make a statement and present documentary evidence in his behalf. The committee's report, a copy of which is provided the inmate, must clearly state the basis for the decision and the disposition.

The committee can take any of a number of steps. It may exonerate the inmate (the report of misconduct is expunged from the inmate's file); refer him to various institutional programs and service resources; reprimand him; subject him to certain restrictions; withdraw certain privileges; remove him from certain programs, job assignments, or quarters; or recommend that the charges be referred to the Institution Discipline Committee, which has authority to impose a broader range of sanctions.

2. CURRENT PROCEDURES FOR IMPOSITION OF SERIOUS SANCTIONS

In cases where forfeiture or withholding of good time credits, transfer for disciplinary reasons, discipli-

[3] The policy statement includes sections which set forth the rights and responsibilities of federal inmates and a list of prohibited acts. App. B, *infra* pp. 64–67. At the time of his arrival at the institution, the prisoner is advised in writing what acts are prohibited and of the types of disciplinary action that may be taken.

nary segregation, or recommendations to the Board of Parole for recession or retardation of parole grants may be appropriate, the matter is referred to the Institution Discipline Committee. The Committee includes no fewer than three members and shall not include either the reporting or the investigating officer.[4]

The inmate is given advance written notice of charges against him no less than twenty-four hours before his appearance before the Institution Discipline Committee. He is advised that he can have a staff member represent him at the hearing. The staff member will be available to assist the inmate in speaking with witnesses, presenting favorable evidence on the merits of the charges, and in presenting evidence in extenuation or mitigation. The inmate is permitted to call witnesses and present documentary evidence. Reasons for declining to call requested witnesses must be documented in the Committee's report. The Institution Discipline Committee prepares a record of the proceedings which, although not verbatim, will include the inmate's advice of his rights, the Committee's finding, its decision, the specific evidence relied on by the Committee and a brief statement of the reasons for the sanctions imposed. The inmate is advised that he can appeal the Committee's decision to the Chief Executive Officer of the institution within thirty days.

[4] The policy statement provides that a staff member witnessing the incident may sit as a member of the Committee in those few situations in which the misconduct was such that virtually every staff member witnessed it in whole or part. App. B, *infra*, p. 73.

CURRENT PROCEDURES FOR APPEAL FROM DISCIPLINARY ACTION

The inmate can appeal the imposition of any disciplinary sanction to the Chief Executive Officer of the institution. That officer may approve, modify or reverse any disciplinary action taken; however, he can not increase the sanction imposed. Upon administrative review, consideration is given to whether (1) there has been compliance with the procedural requirements; (2) the decision has a substantial factual basis; and (3) the sanction imposed was disproportionate to offense.

The inmate can also seek review by the Regional Director. Bureau of Prisons, Policy Statement 2001.6A, "Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities," issued February 14, 1974.[5] Adverse decisions of the Regional Directors can be appealed to the Bureau of Prisons' General Counsel.

[5] An inmate's recourse to administrative review is not limited to adverse disciplinary actions, but is open to all inmate grievances. Based on successful operation of a program instituted on a pilot basis in three institutions, this program became effective in all federal institutions on April 1, 1974. It is our hope that such a procedure may not only reduce the burden imposed on federal courts by suits reflecting inmate grievances, but also may reduce the frequency and intensity of inmate-staff confrontations and attendant inmate misconduct, thereby reducing the number of occasions requiring disciplinary action.

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APPENDIX B

Bureau of Prisons Policy Statement No. 7400.5D, dated July 7, 1975, and establishing the Bureau's disciplinary procedures, provides:

1. PURPOSE

This statement of policy is to assure that inmate discipline and control are fully consonant with the correctional objectives of the institution, the focus being on (a) individual inmate adjustment to the program, behavior standards, and limitations necessarily imposed by the administration; (b) the general welfare and safety of the institutional community; and, (c) the incorporation of due process standards for inmate disciplinary hearings as prescribed by the Supreme Court in *Wolff* v. *McDonnell*, 418 U.S. 528, 94 S. Ct. 2963, 41 L. Ed 2d 935 (1974).

2. DIRECTIVES AFFECTED

Policy Statements 7400.5C and 7400.6A are superseded.

3. POLICY

It is the policy of the Federal Bureau of Prisons to maintain an institutional climate in all of its facilities so that every inmate may complete his term of confinement with a minimum of corrosive effect and a maximum gain in his ability to more adequately main-

tain a successful community adjustment following release. In order that the majority of inmates might live in a safe and orderly environment, it is necessary that those individuals whose behavior is in noncompliance with institution rules be brought to the attention of the appropriate authorities.

Disciplinary action is but one factor in correctional treatment and control. There are other individualized correctional programs and goals that shall be given consideration by the administration. The objective of this approach is the future voluntary acceptance of institution regulations which are required for the general welfare of the institution community and serve as an aid to law-abiding behavior following release.

4. ACTION

A single Institution Discipline Committee will be established in each Bureau of Prisons Institution. In the event of a serious *disturbance or other emergency, or if an offense is committed in the presence of the Committee, the Chief Executive Officer may establish more than one Institution Discipline Committee with approval of the appropriate Regional Director. The Committee will be composed of at least three (3) members, of whom two (2) will be of department head level or above; the Chairman will be of the level of department head or above. **This requirement as to the level of members will not apply to Community Treatment Centers or Camps.

**Exceptions to this procedure for Community Treatment Centers are noted in paragraph 13 of this Policy Statement.

*The Chief Executive Officer of each institution will delegate to the Institution Discipline Committee the authority to order an inmate placed or retained in disciplinary segregation, to order the withholding or forfeiture of good time, to order an inmate transferred for disciplinary reasons, and to make recommendations to the U.S. Board of Parole for rescission or retardation of *parole grants. The Board, however, may request the Institution Discipline Committee to hold a fact finding hearing in any case whenever the Board deems it necessary to determine whether a parole grant is to be rescinded or retarded. In study cases (4208(b), 4252, 5010(e), 5037(c) any report of disciplinary action to the sentencing judge must be preceded by a hearing in accordance with paragraph 9 of this policy statement. The authority to impose sanctions other than disciplinary segregation, withholding or forfeiture of good time, transfer for disciplinary reasons, and to make recommendations to the U.S. Board of Parole for rescission or retardation of parole grants, will be lodged in such person or persons as the Chief Executive Officer may direct. Where the institution has a unit management system, the authority to impose these lesser sanctions will be delegated to staff members in the inmate's unit.

Each institution having the need for facilities to house inmates separate from the general population will establish special housing units consisting of two types: Administrative Dentention and Disciplinary Segregation.

An inmate may be placed in Administrative Detention when his attitude and conduct indicate that his

continued presence in the general population poses a serious threat to life, property, himself, staff, other inmates or to the security of the institution, and when the inmate:

(a) Is pending a hearing for a violation of institution rules or regulations;

(b) Is pending an investigation of a violation of institution rules or regulations;

(c) Is pending investigation or trial for a criminal act;

*(d) Requests admission to Administrative Detention for his own protection or the staff determines that admission to or continuation in Administrative Detention is necessary for the inmate's own protection;

*(e) Is pending transfer or is in holdover status during transfer; or

(f) Is pending classification.

An inmate may be placed in disciplinary segregation when his continued presence in the general population poses a serious threat to himself, staff, or other inmates or to the security of the institution and when the Institution Discipline Committee directs following a hearing conducted in accordance with the limited due process requirements as outlined in paragraph 9 of this policy statement in which the inmate has been found to have committed a serious violation of institution rules or regulations.

5. GENERAL PRINCIPLES

The following general principles shall be applicable in every disciplinary action taken:

(a) Disciplinary action shall be taken at such times

and in such measures and degree as is necessary to regulate an inmate's behavior within acceptable limits;

(b) Inmate behavior shall be controlled in a completely impartial and consistent manner;

(c) Disciplinary action shall not be capricious, retaliatory, or for the purpose of revenge;

(d) Corporal punishment of any kind is strictly prohibited; and

(e) Accurate, detailed reports of disciplinary actions shall be maintained in accordance with the requirements of this policy statement.

6. INFORMATION TO INMATES

Each inmate is to be advised in writing at the time of arrival at an institution of:

(a) His rights and responsibilities;

(b) Acts prohibited in the institution;

(c) The types of disciplinary action which may be taken; and

(d) The disciplinary system within the institution.

This information will be provided in booklet or pamphlet form as part of the admission orientation program. A signed receipt will be obtained from each inmate acknowledging that he has received a copy of the booklet or pamphlet.

(e) *Rights and Responsibilities*

Rights	*Responsibilities*
1. You have the right to expect that as a human being you will be treated respectfully, impartially, and fairly by all personnel.	1. You have the responsibility to treat others, both employees and inmates, in the same manner.
2. You have the right to be informed of the rules, procedures, and schedules concerning the operation of the institution.	2. You have the responsibility to know and abide by them.

3. You have the right to freedom of religious affiliation, and voluntary religious worship.	3. You have the responsibility to recognize and respect the rights of others in this regard.
4. You have the right to health care which includes nutritious meals, proper bedding and clothing, and a laundry schedule for cleanliness of the same, an opportunity to shower regularly, proper ventilation for warmth and fresh air, a regular exercise period, toilet articles and medical and dental treatment.	4. It is your responsibility to not waste food, to follow the laundry and shower schedule, to maintain neat and clean living quarters, and to seek medical and dental care as you may need it.
5. You have the right to visit and correspond with family members, and friends, and correspond with members of the news media in keeping with the facility rules and schedules. You also have a right to uncensored and uninspected out going correspondence with members of the news media through the Prisoners' Mail Box System. Letters forwarded to the news media through PMB are subject to the regulations of that System.	5. It is your responsibility to conduct yourself properly during visits, to not accept or pass contraband, and to not violate the law through your correspondence.
6. You have the right to unrestricted and confidential access to the courts by correspondence (on matters such as the legality of your conviction, civil matters, pending criminal cases, and to conditions of your imprisonment).	6. You have the responsibility to present honestly and fairly your petitions, questions, and problems to the court.
7. You have the right to legal counsel from an attorney of your choice by interviews and correspondence.	7. It is your responsibility to use the services of an attorney honestly and fairly.
8. You have the right to participate in the use of law library reference materials to assist you in resolving legal problems. You also have the right to receive help when it is available through a legal assistance program.	8. It is your responsibility to use these resources in keeping with the procedures and schedule prescribed and to respect the rights of other inmates to the use of the material.

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9. You have the right to a wide range of reading material for educational purposes and for your own enjoyment. These materials may include magazines and newspapers sent from the publishers.	9. It is your responsibility to seek and utilize such materials for your personal benefit, without depriving others of their equal rights to the use of this material.
10. You have the right to participate in education, vocational training, and employment as far as resources are available, and in keeping with your interests, needs, and abilities.	10. You have the responsibility to take advantage of activities which may help you live a successful and law abiding life within the institution and in the community. You will be expected to abide by the regulations governing the use of such activities.

(f) *Prohibited Acts in Federal Penal and Correctional Institutions*

001 Killing
002 Assaulting any person
003 Fighting with another person
004 Threatening another with bodily harm, or with any offense against his person or his property
005 Extortion, blackmail, protection: demanding or receiving money or any thing of value in return for protection against others, to avoid bodily harm, or under threat of informing
051 Engaging in sexual acts with others
052 Making sexual proposals or threats to another
053 Indecent exposure
101 Escape
102 Attempting or planning escape
103 Wearing a disguise or mask
151 Setting a fire
152 Destroying, altering, or damaging government property, or the property of another person
153 Stealing (theft)
154 Tampering with or blocking any locking device
155 Adulteration of any food or drink
201 Possession or introduction of an explosive or any ammunition
202 Possession or introduction of a gun, firearm, weapon, sharpened instrument, knife, or unauthorized tool
203 Possession, introduction, or use of any narcotics, narcotic paraphernalia, drugs, or intoxicants not prescribed for the individual by the medical staff
204 Misuse of authorized medication
205 Possession of money or currency, unless specifically authorized
206 Possession of property belonging to another person
207 Loaning of property or anything of value for profit or increased return

208 Possession of any thing not authorized for retention or receipt by the inmate, and not issued to him through regular institutional channels
209 Possessing any officer's or staff clothing
210 Possessing unauthorized clothing
211 Mutilating or altering clothing issued by the government
251 Rioting
252 Encouraging others to riot
253 Engaging in, or encouraging, a group demonstration
254 Refusing to work, or to accept a program assignment
255 Encouraging others to refuse to work or participate in work stoppage
256 Refusing to obey an order of any staff member
257 Violating a condition of furlough
301 Unexcused absence from work, or any assignment
302 Malingering, feigning an illness
303 Failing to perform work as instructed by a supervisor
304 Insolence towards a staff member
305 Lying or providing a false statement to a staff member
306 Conduct which disrupts or interferes with the security or orderly running of the institution
351 Counterfeiting, forging, or unauthorized reproduction of any document, article of identification, money, security, or official paper
401 Participating in an unauthorized meeting or gathering
402 Being in an unauthorized area
451 Failure to follow safety or sanitation regulations
452 Using any equipment or machinery which is not specifically authorized
453 Using any equipment or machinery contrary to instructions or posted safety standards
501 Failing to stand count
502 Interfering with the taking of count
551 Making intoxicants
552 Being intoxicated
553 Smoking where prohibited
554 Using abusive or obscene language
601 Gambling
602 Preparing or conducting a gambling pool
603 Possession of gambling paraphernalia
651 Being unsanitary or untidy: failing to keep one's person and one's quarters in accordance with posted standards
653 Tattooing or self-mutilation
701 Unauthorized use of mail or telephone
702 Unauthorized contacts with the public
703 Correspondence or conduct with a visitor in violation of posted regulations
751 Giving or offering any official or staff member a bribe, or any thing of value
752 Giving money or any thing of value to, or accepting money or any thing of value from; another inmate, a member of his family, or his friend
801 Attempting to commit any of the above offenses, aiding another person to commit any of the above offenses, and making plans to commit any of the above offenses shall be considered the same as a commission of the offense itself

7. INCIDENT REPORT AND INVESTIGATION

(a) *Incident Report:* Informal resolution of incidents involving violations of institution rules or regulations is encouraged. However, where an employee witnesses or has a reasonable belief that a violation of institution rules or regulations has been committed by an inmate, and where the employee deems that informal resolution of the incident is unwarranted, the employee shall prepare an incident report and forward it tothe appropriate correctional supervisor. The appropriate correctional supervisor may informally dispose of the incident report or forward the incident report for further disposition consistent with this policy statement.

The reporting employee should complete Part 1 of the incident report immediately. The incident is to be one of the Prohibited Acts listed in paragraph 6(f) of this policy statement. The entire language of the Prohibited Act(s) does not have to be copied. Only the relevant portion need be used. For example, "Destroying Government Property, Code No. 152", "Possessing narcotics, Code No. 801" would be acceptable listings for appropriate charges.

The description of the incident should contain the details of the activity which is being reported. All facts about the incident which are known by the employee should be recorded. If there is anything unusual about the inmate's behavior, this should be noted. The reporting employee should also list any staff or inmate witnesses to the incident, and the disposition of any physical evidence (weapons, property, and etc.) which

the employee may have personally handled. The reporting employee will sign the report and indicate his title in the appropriate blocks. The incident report should then be forwarded to the appropriate correctional supervisor for disposition.

(b) *Investigation:* The investigation should be conducted within 24 hours of appointment of the investigator, unless circumstances beyond the control of the investigator intervene. The investigating officer should ordinarily be an employee of supervisory level and may not be the employee reporting the particular incident in question. Where it appears likely that the incident may be the subject of a criminal prosecution, investigation should be suspended and the inmate should not be questioned until the FBI interviews have been completed. (See Policy Statement 2200.1.)

Ordinarily, an inmate will be given a copy of the incident report by the investigating officer at the beginning of the investigation. If the investigation is delayed for any reason, any employee may deliver the charges to the inmate. The date and time the inmate receives a copy of the Incident Report will be noted. This should be done within eight (8) hours from the time the investigator received his assignment, unless there are exceptional circumstances which prevent it. The investigator should also read the charges to the inmate and obtain his statement concerning the incident, except as provided above. Comment about the inmate's attitude may be included here.

The investigator should then thoroughly investigate the incident. He should talk to witnesses, and sum-

marize their statements. The disposition of evidence should be recorded. Often, he will want to talk to the reporting employee to obtain his report first hand and to clarify any questions the investigator may have. All steps and actions taken should be recorded on the incident report.

Under Comments and Conclusions, the investigator may include his comments on the inmate's prior record and behavior, his analysis of any conflicts between witnesses, and his conclusions of what in fact happened. The inmate does not receive a copy of the investigation. However, should the case ultimately be forwarded to the Institution Discipline Committee, the investigation should be given to the inmate's staff representative for use in presentation on the inmate's behalf.

8. MINOR DISPOSITIONS

The Chief Executive Officer of each institution shall delegate to such persons he selects the authority to impose minor dispositions and sanctions for violations of institution rules or regulations. Where the institution has a unit management system, the authority to impose minor dispositions and sanctions shall be delegated to staff members *of an inmate's unit. Minor dispositions and sanctions are those actions imposed for violation of institution rules or regulations other than segregation, withholding or forfeiture of good time, transfer for disciplinary reasons, or recommendations to the U.S. Board of Parole for rescission or retardation of parole grants. While the process by which minor dispositions are imposed is left to the

discretion of the Chief Executive Officer of each institution, the following minimum standards will apply throughout the Bureau of Prisons:

(a) Each inmate charged with violating an institution rule or regulation shall be given a written copy of the charge or charges against him within 24 hours of the infraction.

*(b) Each inmate so charged will be entitled to a hearing before someone other than the reporting or investigating officer, held within 48 hours (excluding weekends and holidays) of the incident to consider the charge brought against him.

(c) The inmate will be entitled to be present at the hearing except during deliberations of the decision maker and where institutional security would be jeopardized. The reasons for excluding an inmate from the hearing must be well documented in the record.

(d) The inmate will be afforded the opportunity to make a statement and to present documentary evidence in his own behalf.

(e) The inmate will be given a written copy of the decision and disposition. Review of any action taken as a minor disposition will be pursuant to the Administrative Remedy Procedure, Policy Statement 2001.6A.

(f) Where an alleged violation of institution rules or regulations warrants consideration for other than minor sanction, the charge may be referred to the Institution Discipline Committee for hearing and disposition. Copies of all relevant documents should be forwarded to the Chairman of the Institution Dis-

cipline Committee with a brief statement of reasons for the referral along with any recommendations for appropriate disposition should the inmate be *found to have committed the act charged. The inmate whose charge is being referred to the Institution Discipline Committee may be retained in Adminstrative Detention or other restricted status, but should have no final disposition imposed if the matter is referred to the Institution Discipline Committee.

(g) When charges are to be referred to the Institution Discipline Committee, the inmate shall be advised of the rights afforded at a hearing before the Institution Discipline Committee. He shall be asked to indicate his choice of staff representative and the names of any witnesses he wishes to be called to testify on his behalf at the hearing. (A sample form that may be used for this purpose is attached to this policy statement.)

(h) Where the person or persons delegated the authority to impose minor dispositions determines that the inmate is innocent of committing any prohibited act, the inmate's file shall be expunged of the incident report lodged against him.

*(i) Time limits imposed in this section may be extended for good cause.

9. INSTITUTION DISCIPLINE COMMITTEE

(a) *Composition:* The Chief Executive Officer may appoint as many members to the Institution Discipline Committee as he deems appropriate. No fewer than three members, including the Chairman, must be

present at any hearing to constitute a quorum. The Chairman and no less than one member present at the hearing will be of the department head level or higher. The third member of the Committee need not be of department head level. For the purpose of this section, "department head" includes acting department head. This requirement as to the level of staff members and Chairman will not apply to Community Treatment Centers or Camps. In order to insure impartiality, a staff member may not sit as a member of the Institution Discipline Committee if he reported or investigated the incident of rules infraction being considered. Ordinarily a staff member witnessing an incident under consideration should not sit as a member of the Institution Discipline Committee. However, a staff member witnessing an incident may sit as a member of the Institution Discipline Committee where the incident is so widely witnessed that virtually every staff member has witnessed it in whole or part. Likewise, a staff member may not sit as a member of the Institution Discipline Committee if he played any significant part in having the charges referred to the Institution Discipline Committee for consideration. The Chief Executive Officer should appoint members to this Committee who are broadly representative of the primary areas of institutional administration and who are fully knowledgeable of the requirements of this policy statement and of the functions of Inmate Discipline.

(b) *Functions:* The Institution Discipline Committee shall conduct hearings, make findings, and may impose appropriate sanctions on incidents of inmate

misconduct referred to it for disposition *following a hearing as required by paragraph 8 of this policy statement before the unit or team discipline committee or other persons delegated the authority to impose minor dispositions in accordance with the due process standards as listed below. The Institution Discipline Committee may not hear any case or impose any sanctions (except as provided in paragraph 9(d)(4), continuing offenses) not heard and referred by the unit or team discipline committee or other persons delegated the authority to impose minor dispositions. Findings of the Committee that an inmate has committed a prohibited act must be based upon a substantial factual basis; i.e. based on sufficient evidence from which it can be concluded that the particular individual committed the prohibited act charged. While this Committee may impose any lesser sanctions available, only this Committee will have the authority to order: (1) an inmate placed in disciplinary segreation, (2) an inmate's good time withheld or forfeited, (3) an inmate transferred to another institution for *disciplinary reasons, or (4) to recommend to the U.S. Board of Parole that an inmate's parole grant be retarded or rescinded. This Committee will also conduct reviews of inmates placed in disciplinary segregation in accordance with requirements listed below.

(c) *Procedural Requirements:* An inmate may not be placed in disciplinary segregation, have his good time withheld or forfeited, be transferred to another institution for disciplinary reasons, or *have the Bureau recommend retardation or recission of a parole grant unless there has been a fact-finding hearing be-

fore the Institution Discipline Committee in which the following procedures have been satisfied:

(1) An inmate will be given advance written notice of the charge(s) against him no less than 24 hours before his appearance before the Institution Discipline Committee. An inmate may waive in writing this 24 hour notice requirement.

(2) An inmate will be provided the service of a full-time staff member to represent him at the hearing before the Institution Discipline Committe should he so desire. The staff *representative will be available to assist the inmate if he desires by speaking to witnesses and by presenting favorable evidence to the Committee on the merits of the charges. The staff representative will also assist in presenting evidence in extenuation or mitigation of the charges. The Chairman shall arrange for the presence of a selected staff representative. If the staff member selected declines or is unavailable because of absence from the institution, the inmate should be given the options of selecting another representative, or in the case of an absent staff member, of waiting a reasonable period for his return, or continuing the hearing without a *staff representative. Where an inmate who is illiterate requests a staff representative or where an inmate facing complex charges requests a staff representation, but staff members decline this role, the Chief Executive Officer shall appoint a staff representative to assist such inmate. A staff representative should be given adequate time to speak with the inmate and interview requested witnesses where appropriate. While it is expected that a staff member will have had ample time to prepare

prior to the hearing, delays in the hearing to allow for adequate preparation may be ordered by the Chairman of the Institution Discipline Committee.

(3) An inmate will be permitted to have witnesses called and to present documents in his behalf, provided the calling of witnesses or the disclosure of documentary evidence would not jeopardize or threaten institutional security. The Chairman will call those witnesses he deems reasonably available and necessary for an appreciation of the circumstances surrounding the charge. Repetitive witnesses need not be called. Unavailable witnesses may be asked to submit written statements. Reasons for declining to call requested witnesses will be documented in the Committee's report. Witnesses requested by the inmate who are called should be questioned by his staff representative or where staff representation has been waived, by members of the Committee. Inmates who have waived the services of a staff representative may submit questions for requested witnesses in writing to the Committee.

(4) The Institution Discipline Committee will prepare a record of its proceedings which need not be verbatim. This record must be sufficient to document the advisement of inmate rights, the Committee's findings, the Committee's decision, the specific evidence relied on by the Committee, and a brief statement of the reasons for the sanctions imposed. The evidence relied upon for the decision and the reasons for the actions taken should be set out in specific terms unless doing so would jeopardize institutional security. (A sample form that may be used to advise an inmate of

his rights at an Institution Discipline Committee hearing is attached to this policy statement.)

(5) An inmate will be permitted to be present throughout the Institution Discipline Committee hearing except during deliberations of the Committee and except where institutional security would be jeopardized. The reasons for excluding an inmate from the hearing must be well documented in the record. A hearing may be conducted in the absence of an inmate where the inmate refuses to appear and he can not be brought to the hearing without the use of force. When an inmate escapes from custody, the Institution Discipline Committee will conduct a hearing in the inmate's absence at the institution from which the escape occurred. When an inmate who has had sanctions imposed (such as loss of good time) while absent from custody, returns to custody, he will be advised of his right to have the escape charge brought before the Institution Discipline Committee at the institution where he returned to custody. All the procedural requirements of Institutional Discipline Committee hearings will apply to this rehearing except written statements of witnesses not readily available may be liberally used instead of live witnesses. The Institution Discipline Committee, upon rehearing, may dismiss the charge, or may modify but may not increase the sanctions previously imposed in the inmate's absence.

(d) *Dispositions of the Institution Discipline Committee:* The Institution Discipline Committee shall have available a broad range of sanctions and disposi-

tions. These dispositions and sanctions will include the following:

The Institution Discipline Committee may

(1) Dismiss any charge(s) before it where appropriate and shall order the record of charges expunged where the inmate has been determined innocent of the charge(s).

(2) Impose sanctions and dispositions available to the person or persons designated to impose minor dispositions.

(3) Direct that an inmate be placed or retained in disciplinary segregation pursuant to guidelines contained in this policy statement.

(4) Direct that an inmate's good time be withheld. Withholding of good time should be limited to misconduct or offenses; it should not be applied as a universal punishment to all persons in disciplinary segregation status. Withholding shall be limited to the good time creditable for the single month during which the violation occurs. (Some offenses, such as refusal to work at an assignment, may be recurring, and thus may permit consecutive withholding actions.) With*held good time must be considered for restoration on or about six (6) months from the date of the offense which formed the basis of the withholding. Withheld good time may be considered for restoration earlier than the six (6) month date if circumstances warrant.

(5) Direct that an inmate's good time be forfeited. The good time available for forfeiture is limited to an amount computed by multiplying the number of months served at the time of the offense for which

forfeiture action is taken, by the applicable monthly rate specified in 18 United States Code, Section 4161 (less any previous forfeiture or withholding outstanding), plus extra good time which may have been earned to the date of the offense. All or part of an inmate's accumulated good time may be forfeited. Authority to restore all types of forfeited and withheld good time is delegated to the Institution Discipline Committee of each *institution. Forfeited good time must be considered for restoration on or about one (1) year from the date of the offense which formed the basis of the forfeiture. Forfeited good time may be considered for restoration earlier than the one (1) year date if circumstances warrant.

(6) Direct that an inmate be transferred to another institution for disciplinary reasons. Where a present or impending emergency requires immediate action, an inmate may be transferred prior to an Institution Discipline Committee hearing. However, a hearing before the Institution Discipline Committee at the receiving institution must be conducted as soon as practicable under the circumstances to consider the factual basis of the charge of misconduct and the reasons for the emergency transfer. Transfers for disciplinary reasons prior to a hearing before the Institution Discipline Committee are to be used only in emergency situations and only with the approval of the receiving Regional Director. However, when an inmate is transferred under these circumstances, the sending institution will forward copies of incident reports with completed investigation to the receiving institution's Institution Discipline Committee. All procedural

requirements applicable to Institution Discipline Committee hearings contained in paragraph 9(c) of this policy statement will be utilized, except written statements of unavailable witnesses may be liberally accepted instead of live testimony.

(7) Suspend the execution of any sanction it imposes.

*(8) Make recommendations to U.S. Board of Parole for retardation or rescission of parole grants and hold fact finding hearings upon request of the Board as set forth in paragraph 4 above.

(e) *Criminal Prosecutions:* Where an inmate's misconduct may also be the subject of a criminal prosecution, it is not necessary to await the outcome of the criminal trial before taking disciplinary action, especially if there is reason to believe there will be a long delay before the trial is held. An inmate under investigation of the FBI or other law enforcement officers for an offense committed in the institution may not be questioned about the charge until the FBI interviews are completed. An inmate who is the subject of criminal prosecution for institutional violations will not be transferred from the jurisdiction of the trial court without the consent of the appropriate United States Attorney or the Court in which the trial is pending.

*(f) *Expunging Records*: As set forth in paragraph 8(h) and subparagraph (d)(1) of this paragraph, an inmate's file shall be expunged of the disciplinary report against him whenever he is found not to have committed a prohibited act. The requirement for expunging the inmate's file does not preclude

maintaining copies of disciplinary actions resulting in "not guilty" findings in a master file separate from the inmate's institution file provided the contents of the master file are not used in any manner which would adversely affect the inmate. Likewise, the expungement requirement does not require the destruction of medical reports or Special Housing Report Forms relating to a particular inmate which must be maintained to document medical treatment given in a Special Housing Unit. In the situation where an inmate's conduct during one continuous incident may violate more than one prohibited act, and the incident is reported on a single Incident Report, if the inmate is found not to have committed every prohibited act charged, then the record will clearly show what violations were not proven. No further expunging is possible or necessary. The existence of charged but unproven misconduct will not be used against the inmate.

10. APPEALS FROM INSTITUTION DISCIPLINE COMMITTEE ACTIONS

At the time the Institution Discipline Committee gives an inmate notice of its decision, the Committee will also advise the inmate that he may appeal the Committee's decision to the Chief Executive Officer. Appeals must be filed no later than thirty (30) days after notice of the decision. This time limit may be extended for good cause shown. An inmate wishing to appeal any disciplinary action imposed as a result of a hearing before the Institution Discipline Committee

must use the procedures and forms provided for by Policy Statement 2001.6A (Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities). The Chief Executive Officer may approve, modify, or reverse any disciplinary action of the Institution Discipline Committee as he deems appropriate. This authority may not be delegated. The Chief Executive Officer may not increase the amount of forfeiture imposed.

An inmate may appeal an adverse decision of the Chief Executive Officer through the appeal procedures contained in Policy Statement 2001.6A to the appropriate Regional Director. Appeals to the Regional Director from adverse decisions from the Chief Executive Officer must be filed no later than thirty (30) days from the date of the Chief Executive Officer's decision.

Additionally, appeals of adverse decision from the Regional Director may be made to the Assistant Director, General Counsel and Review within thirty (30) days of the decision from the Regional Director.

On appeal the following factors will be considered:

(a) Was there substantial compliance with the Policy Statement on Inmate Discipline?

(b) Was the decision of the Institution Discipline Committee based on substantial evidence?

(c) Under the circumstances, was the sanction imposed disproportionate to the offense?

11. SPECIAL HOUSING UNITS

Each institution having the need for facilities to house inmates separate from the general population

will establish special housing units consisting of two types: Administrative Detention and Disciplinary Segregation. (Some institutions may also have a facility for long-term control unit programs—see Policy Statement 7300.80.) Special Housing Units will be maintained in accordance with the policies and procedures contained in this policy statement.

(a) *Administrative Detention:* Administrative Detention is the status of confinement which results in a loss of some privileges which the inmate would have if assigned to the general population. Administrative Detention is to be used only where the continued presence of the inmate in general population poses a serious threat of life, property, himself, other inmates, staff members or the security of the institution.

(1) *Placement in Administrative Detention:* An inmate may be placed in Administrative Detention by persons designated by the Chief Executive Officer. These persons may be correctional supervisors, shift supervisors or members of an *inmate's unit or team. An inmate may be placed in Administrative Detention when his attitude and conduct indicate that his continued presence in the general population poses a serious threat to life, property, himself, staff, other inmates or to the security of the institution, and when the inmate:

a. Is pending a hearing for a violation of institution rules or regulations;

b. Is pending an investigation of a violation of institution rules or regulations;

c. Is pending investigation or trial for a criminal act;

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*d. Requests admission to Administrative Detention for his own protection or the staff determines that admission to or continuation in Administrative Detention is necessary for the inmate's own protection;

*e. Is pending transfer or is in holdover status during transfer; or

f. Is pending classification.

A memorandum detailing the reason for placing an inmate in Administrative Detention will be prepared and given to members of the inmate's unit or team, with a copy to the Operations Supervisor of the Administrative Detention unit. A copy of this memorandum will also be given to the inmate provided institutional security is not thereby compromised.

(2) *Review of Inmates Housed in Administrative Detention:* The Chief Executive Officer shall designate such person or persons he deems appropriate to review the status of inmates housed in Administrative Detention. Normally the Operations Supervisor of the Administrative Detention unit or members of the inmate's unit or team should be delegated this authority. Initial placement shall be accomplished by means of a *memorandum detailing the reasons for this action. The reviewing authority will formally review the status of each inmate who spends seven (7) continuous days in Administrative Detention, and thereafter such cases will be reviewed on the record each week and will be formally reviewed at least every thirty (30) days. The inmate shall appear before the reviewing authority at such formal reviews unless the inmate refuses to appear without the use

of force. Administrative Detention is to be used only for short periods of time except where an inmate needs long-term protection. An inmate may be kept in Administrative Detention for longer-term protection where the need for such protection is well documented. (See P.S. 7900.51.) Inmates shall be released when the reasons for their initial placement ceases to exist or where their return to general population would no longer pose a serious threat to themselves, to staff or other inmates or the security of the *institution. (A standardized form for review is attached.)

(3) *Conditions of Administrative Detention:* The basis level of conditions as described below for Disciplinary Segregation will also apply to Administrative Detention. To the extent possible, inmates housed in Administrative Detention will be afforded the same general privileges given to inmates in general population as is consistent with existing resources available and the security needs of the unit. Unless there are compelling reasons to the contrary, institutions should provide commissary privileges, reasonable amounts of personal property, and exercise periods exceeding those provided for inmates housed in Disciplinary Segregation. Visiting and correspondence privileges of the general population should be given inmates in Administrative Detention.

*(4) *Temporary Placement in Disciplinary Segregation:* An inmate who is causing a serious disruption (threatening life or property) in Administrative Detention, who cannot be controlled within the physical confines of Administrative Detention, and who cannot be safely transferred to the institution hos-

pital, may be moved temporarily (not exceeding three (3) days) to Disciplinary Segregation pending a hearing before the Institution Disciplinary Committee. The authority to order the temporary move into Disciplinary Segregation is limited to the official in charge of the institution at the time the move is ordered. A fully documented report of every such movement shall be immediately forwarded to the appropriate Regional Director.

(d) *Disciplinary Segregation:* Disciplinary Segregation is the status of confinement of an inmate housed in an individual cell either by himself or with other inmates, separated from the general population, as a result of a hearing before the Institution Discipline Committee in which the inmate has been found to have committed a prohibited act. Inmates housed in Disciplinary Segregation will have significantly fewer privileges than those housed in Administrative Detention. Disciplinary Segregation is to be used only where other available dispositions are inadequate to regulate an inmate's behavior within acceptable limits and where the inmate's presence in the general population poses a serious threat to life, property, to himself, staff or other inmates or the security of the institution.

(1) *Placement in Disciplinary Segregation:* An inmate may be placed in Disciplinary Segregation only by direction of the Institution Discipline Committee following a hearing in which the inmate has been found to have committed a serious act of misconduct which warrants this serious sanction. Inmates found to have committed serious acts of misconduct should

not be placed in Disciplinary Segregation unless their presence in general population would pose a serious threat to staff or other inmates or to the security of the institution.

*(2) *Review of Inmates in Disciplinary Segregation:* The Institution Discipline Committee will formally review the status of each inmate who spends seven (7) continuous days in disciplinary segregation, and thereafter such cases will be reviewed on the record each week and will be formally reviewed at least every thirty (30) days. The inmate shall appear before the Institution Discipline Committee at such formal reviews unless the inmate refuses to appear without the use of force. (A standardized form for review is attached.)

There will be a psychiatric or psychological interview when Disciplinary Segregation continues beyond thirty (30) days. The interview and report should address the inmate's adjustment to his surroundings and the threat the inmate poses to himself, staff and other inmates. A similar psychiatric or pychological interview and report will be made at subsequent two (2) month intervals should segregation continue for this extended period.

An inmate shall be released from Disciplinary Segregation when he no longer poses a threat to himself, or others or to institutional security and when the Institution Discipline Committee determines that continuation in Disciplinary Segregation is no longer necessary to regulate an inmate's behavior within acceptable limits. The time an inmate spends in Disciplinary Segregation must be proportionate to the

offense committed, taking into consideration the inmate's prior conduct, his specific program needs, and other relevant factors.

(3) *Conditions of Disciplinary Segregation:*

(a) Basic living levels of decency and humane treatment must be maintained, regardless of the purpose for which a man has been segregated. Privileges may be added, for the purpose of reinforcing acceptable behavior, to the living conditions of those whose status is purely involuntary, or whose confinement is long-term. These should not result in excessively time-consuming procedures, or neutralize security or shakedown procedures.

(b) When different levels of living arrangements are effected, because of the difference in purpose of segregation, the differential facilities should be separated physically in ways that materials allowed to one person are not passed to others to whom they are not allowed.

(c) A description of basic living levels follows:

1. *Segregation Conditions:* The quarters used for segregation shall be well ventilated, adequately lighted, appropriately heated and maintained in a sanitary condition at all times. All cells will be equipped with beds. The beds may be securely fastened to the floor or wall of the cell according to the desires and needs of each individual institution. Strip cells will not be a part of the Segregation Unit. Any strip cells which will be utilized will be a part of the medical facility and under the supervision and control of the medical staff.

2. *Cell Occupancy:* Except in emergencies, the number inmates confined to each cell or room shall not exceed the number for which the space was designed. Whenever an emergency arises which indicates that excess occupancy may be temporarily needed, an immediate report shall be made to the head of the institution and his approval obtained.

3. *Clothing and Bedding:* All inmates shall be admitted to segregation dressed in normal institution clothing after a thorough search for contraband but without belt and shall be furnished a mattress and bedding. Cloth or paper slippers may be substituted for shoes at the discretion of the Warden. An inmate shall not be segregated without clothing, mattress, blankets and pillow, except when prescribed by the Medical Officer for medical or psychiatric reasons. If an inmate is so seriously disturbed that he is likely to destroy his clothing or bedding or create a disturbance which would be seriously detrimental to others, the Medical Department shall be notified immediately and a regimen of treatment and control instituted with the concurrence of the Medical Officer.

4. *Food:* As prescribed in existing regulations, segregated inmates shall be fed the normal institution meals on the standard ration and menu of the day for the institution. Disposable utensils may be used when necessary.

5. *Personal Hygiene:* Segregated inmates shall have the opportunity to maintain an acceptable level of personal hygiene, e.g., toilet tissue, wash basin, tooth brushing, eye glasses, etc. When necessary, for rea-

sons of safety or security, a retrievable kit of toilet articles may be issued. Each segregated inmate should shave and shower at least two (2) times a week, unless these procedures would present an undue security hazard.

6. *Exercise:* Each segregated inmate shall be permitted no less than two (2) hours exercise each week. Exercise should be provided in two (2), one (1) hour periods, but if circumstances require, one-half hour periods are acceptable if the two (2) hour minimum is maintained. This provision must be carried out unless compelling security or safety reasons dictate otherwise and these shall be documented.

7. *Personal Property:* Personal property will ordinarily be impounded.

8. *Reading Material:* Ordinarily, it may be provided on a circulating basis.

9. *Supervision:* In addition to the direct supervision afforded by the unit officer, each segregated inmate shall be seen daily by a member of the Medical Department, and one or more other responsible officer(s) designated in the local policy issuance.

10. *Correspondence and Visits:* Social correspondence privileges shall be continued in segregation unless there exist compelling reasons to the contrary. Every effort will be made to notify approved social visitors of any necessary restriction on ordinary visiting procedures so that they may be spared disappointment and unnecessary inconvenience. If ample time for correspondence exists, the burden of this notification may be placed on the inmate. In respect to legal, religious,

and PMB matters, the relevant policy statements should be followed.

11. *Records:*

a. A permanent log will be maintained in the segregation unit. All admissions will be recorded indicating date, reason for admission, and the authorizing official. All releases from the unit will be similarly recorded. Officials required to visit the unit will sign this log, giving time and date of visit. Unusual activity or behavior of individual inmates will be recorded in the log with a follow-up memorandum through the head of the institution for the inmate's file. This will include any misbehavior which should be recorded and reported to the Institution Discipline Committee.

b. A special Housing Unit Record Sheet (BP–IS–111) will also be maintained in accordance with the following instructions, and sent to the institution's central file.

1. The Key at the bottom of the form is self-explanatory.

2. The basic information at the top of the form, with the exception of the date and time of release, will be completed by the Officer in Charge/Unit Officer at time of admittance.

3. The form provides space for a period of up to seven (7) days. The date column will be recorded daily, the shift line will be completed commencing so as to coincide with the date and time the inmate is admitted as reflected at the top of the form.

4. The Officer in Charge/Unit Officer will sign the form in the space provided on line with the shift as indicated. Initials of the officer are not acceptable.

The Physician's Assistant will indicate by his signature in the proper space when an inmate received medication, is examined by a Medical Officer or Physician's Assistant, or requested to see a member of the medical staff. If no medication is received or request made during a shift, the officer may so indicate by recording "NO (N)" in the column.

6. The form is designed for a seven (7) day period, if confinement to segregation continues beyond a seven (7) day period, a new form will be prepared and the completed form forwarded to central file. Date and time of release will be recorded on the final form.

7. Additional comments may be noted on the reverse of the form and in each case, must be dated and include the signature and title of the person making the comment.

12. *Forms:*

a. Notice of Institution Discipline Committee Hearing (BP–IS–114), Locally Reproduced,

b. Inmate Rights at Institution Discipline Committee Hearing (BP–IS–113), Locally Reproduced,

c. Special Housing Record Sheet (BP–IS–111, Locally Reproduced. See Policy Statement 20,001.1B, Note: Title change must be entered manually on existing stock of forms. New forms will include these changes,

d. Incident Report (BP–IS–83A), Secured through regular FPI procurement sources, Note: See Policy Statement 7400.5D, Page 6 for change to Item 254, and addition of Item 257 which must be entered manually on existing stocks of forms. New forms will include these changes.

e. Institution Discipline Committee Report (BP–IS–115), Locally Reproduced, and

*f. Special Housing Review Forms (BP–IS–116), Locally Reproduced.

*13. *Disciplinary Procedures for Federal Community Treatment Centers:* The following exceptions to the general disciplinary procedures enumerated in this policy statement for Bureau of Prisons' Institutions are applicable solely to Federal Community Treatment Centers. All other procedures of this policy statement not affected below are applicable to Community Treatment Centers.

a. *Institution Discipline Committee:* Each Federal Community Treatment Center shall have a single Institution Discipline Committee composed of at least one staff member appointed by the Director of the Center. No member of the Institution Discipline Committee may be the reporting or investigating officer or have played any significant part in having the charge referred to the Institution Discipline Committee. Federal Community Treatment Centers need not establish unit or team discipline committees with minor disposition authority but may have only one discipline committee—the Institution Discipline Committee.

b. *Witnesses Requested at Institution Discipline Committee:* An inmate appearing before the Institution Discipline Committee shall be permitted to call witnesses from outside the Community Treatment Center who are willing to appear before the Institution Discipline Committee at their own expense and whose presence at the hearing would not pose a serious threat to the security of the Center. Witnesses

whose testimony would be repetitious or irrelevant to the charges or disposition need not be called. Where a request for an outside witness has been refused by the Institution Discipline Committee the reasons for refusing such requested witness shall be well documented and written statements from such requested witnesses shall be liberally accepted.

c. *Appeals of Disciplinary Actions:* Appeal of any disciplinary actions within a Federal Community Treatment Center may be made to the Director of the Center anytime within 30 days from the date the disciplinary action was imposed. This appeal and any subsequent appeal to the Regional Director or Assistant Director/General Counsel shall be filed pursuant to the provisions of Policy Statement 2001.6A, Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities.

d. *Offenders Programmed in the Center Pursuant to Public Law 91–492 (Probationers, Parolees, or Mandatory Releasees):* Reports of misconduct by offenders programmed in the Center pursuant to Public Law 91–492 shall be forwarded to the appropriate agency (Probation Office or Parole Board) for disposition that agency deems appropriate and shall not be the subject of disciplinary action within the Center. Immediate notification should be made where the misconduct is serious and arrangements for removal from the Center may be necessary for the protection of life or property.

e. *Escapes from Community Treatment Centers:* Should an offender escape, the facility will immediately notify the FBI, giving specific information about

the escape and listing the time and circumstances of the last contact. All file material will be made available to the local FBI and the U.S. Marshal in the course of their investigation. When an individual is not where he is scheduled to be, and when the facility staff has exhausted its resources to contact him, he will be declared by the facility staff to be in escape status. In *all* cases, the appropriate Community Programs Regional Administrator and/or MCC Director and the Correctional Services Regional Administrator will be notified as soon as possible during normal working hours.

In *all* escapes, the Standard Escape Report will be completed. Further action will be taken following the guidelines under Section 7.a above for handling Incident Reports. Total resolution of the incident must be effected, even to the point of holding the hearing(s) in absentia. In accordance with these instructions, the Escape Report will be treated as an Incident Report.

f. *Use of Part-Time Employees or Federal Family Employees in Disciplinary Process:* With the exception of sitting as a member of the Institution Discipline Committee part-time employees or Federal Family employees (U.S. Probation Officers or U.S. Marshals, etc.) may be used in any stage of the disciplinary process where there is an insufficient number of full-time staff available.

NORMAN A. CARLSON,
Director, Bureau of Prisons.

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